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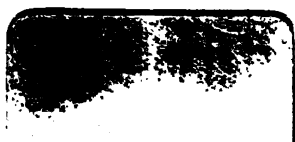
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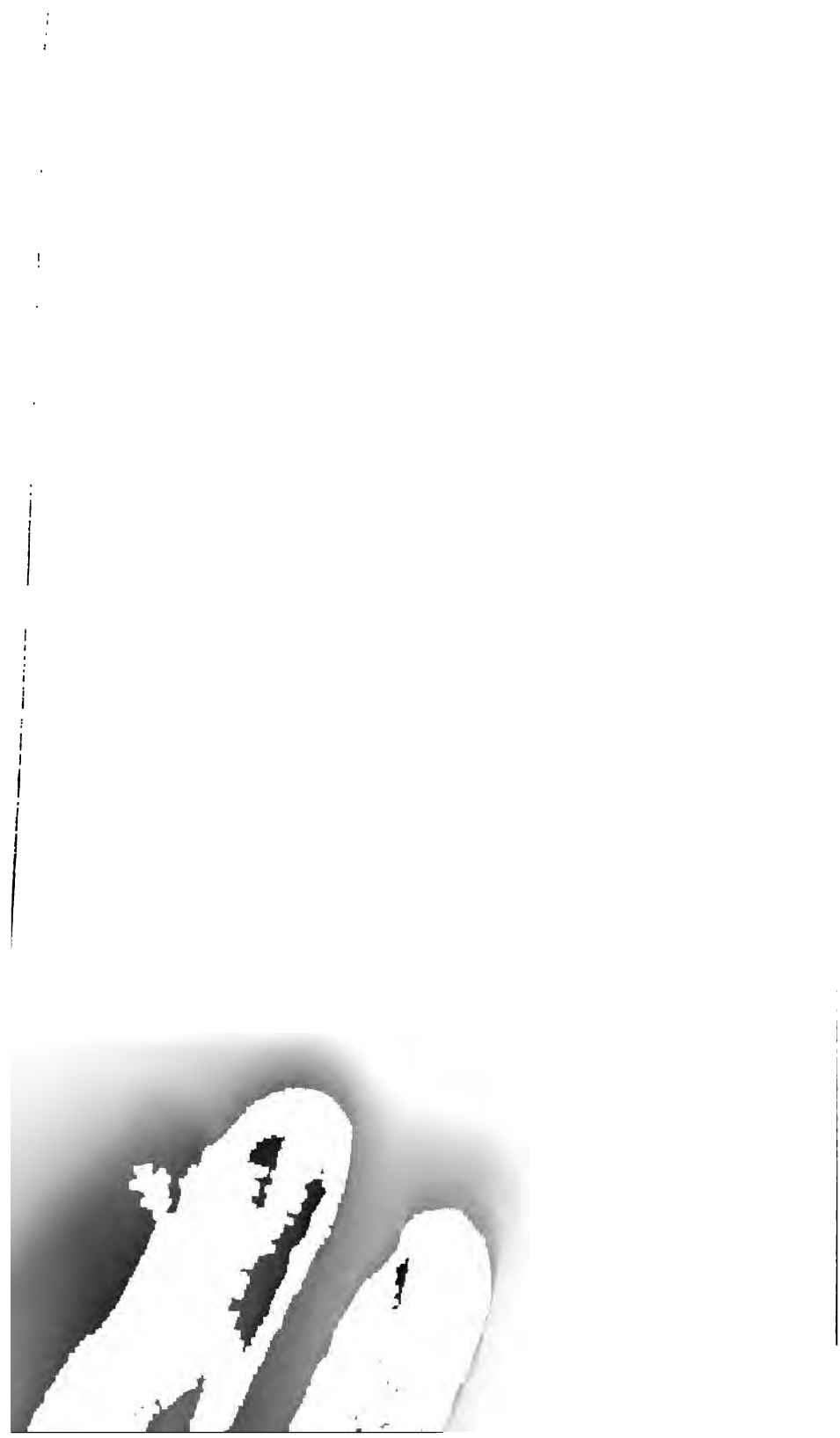
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REPORTS OF CASES
DECIDED IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES, Circuit courts
= FOR THE
(NINTH CIRCUIT.)

REPORTED BY
L. S. B. SAWYER.
COUNSELOR AT LAW.

VOLUME VII.

SAN FRANCISCO:
A. L. BANCROFT AND COMPANY,
LAW BOOK PUBLISHERS, BOOKSELLERS, AND STATIONERS.
1882.

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to transact business in Oregon, and that any act done therein by such corporation before the appointment of such resident attorney, is null and void; and to the same effect is the decision of the supreme court of the state in *Bank of British Columbia v. Page*, 6 Or. 431.

In reply to this, the plaintiff contends that the contract of insurance was not made in Oregon, but in Wisconsin, and is therefore valid, notwithstanding the Oregon statute. The facts bearing upon this question appear to be, that the application for the policy was made at Portland, Oregon, on September 22, 1870, to O. B. Gibson, the agent of the plaintiff, then resident here, who then stated thereon that the "renewals" were to be made at the Portland agency; and was by him forwarded to the plaintiff, who, on October 19, 1870, at Milwaukee, Wisconsin, forwarded the policy, signed by its president and secretary, to said Gibson at Portland, Oregon, who then delivered the same to the insured, and received from him the first quarterly premium of twenty-six dollars cash and thirty-nine dollars and twenty-eight cents in his note. The policy contains this clause: "7. This policy shall not take effect and become binding on the company until the premium shall be actually paid, during the life-time of the person whose life is assured, to the company or some person authorized to receive it, who shall countersign the policy on receipt of the premium."

The policy is "Countersigned by O. B. Gibson, agent."

Generally speaking, the validity of a contract is to be decided by the law of the place where it is made; and if valid or void there, it is valid or void everywhere. The few exceptions to this rule need not be mentioned in the application of it to this case. (Story's Con. Laws, sec. 242 (1) *et seq.*; Cooley's Const. Lim. 286; *Cox v. United States*, 6 Pet. 203; *Hyde v. Goodnow*, 3 N. Y. 269; *In re Pitlock*, 2 Saw. 428.) Where, then, was this contract made? in Wisconsin or Oregon? The answer to this question involves the inquiry, where did the final act take place which made the transaction a contract, binding upon the parties?

The premium was paid to the agent of the plaintiff at Portland, who then and there countersigned and delivered

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the policy. This was the consummation and completion of the contract. But to put this beyond a doubt, the policy itself declares that it shall not be binding on the company, until these acts are performed. And until it was binding upon the company, it was not binding on the applicant—in short, it was not yet a contract, but only a proposition. (*Pomeroy v. Manhattan L. Ins. Co.*, 40 Ill. 400; *Thwing v. Great Western Ins. Co.*, 111 Mass. 109; *Wood F. Ins.* 189 and n. 2; *Hardie v. St. Louis M. L. Ins. Co.*, 26 La. An. 242; *St. Louis M. L. Ins. Co. v. Kennedy*, 6 Bush, 450.)

The case of *Hyde v. Goodnow*, *supra*, cited by counsel for plaintiff, is not contrary to this conclusion. There the assured, living in Ohio, applied to a company in New York, through its local agent and surveyor, for insurance, sending with his application a premium note and the report of the surveyor thereon. The company accepted the application in New York, and mailed the policy direct to the applicant in Ohio, which, in accordance with its by-law, contained the stipulation that it should not be binding until the application and premium note were deposited in the office of the company and approved by its directors. The contract if made in Ohio, was illegal and void, because the company was not authorized to transact business there, but in a suit upon the premium note against the maker in New York, the court held that the contract was made in the latter state, and therefore valid, because, when the application was approved and the policy deposited in the mail, at New York, addressed to the defendant, the contract was then and thereby executed, and became binding on the parties thereto. An offer by mail to insure certain property and an acceptance by letter of the proposition, constitute a valid contract at and from the place and date of mailing such letter of acceptance. (*Taylor v. The Merchants' F. Ins. Co.*, 9 How. 398.)

But admitting that the contract of insurance in this case was made in Oregon, and is therefore illegal and void, the plaintiff contends that it is entitled to the relief sought upon the ground that the defendant Jeremiah obtained money from it, to which he was not entitled, by means of

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the false and fraudulent representations concerning the death of Moses Elliott. In answer to this proposition, the defendant insists, that this suit, if not brought directly upon the illegal contract of insurance, is brought upon an implied one, to the effect that the defendant would return the money thus obtained from the plaintiff; and that such implied contract arises immediately out of, and is connected with the original illegal one, and is therefore illegal itself, citing *McCausland v. Ralston*, 12 Nev. 195; *McBlair v. Gibbes*, 17 How. 233; *Armstrong v. Toler*, 11 Wheat. 258; *Dillon v. Allen*, 46 Iowa, 299. But it is a mistake to suppose this suit is brought upon a contract actually made or attempted to be made by the parties, and within the purview or operation of the prohibition of the statute, or at all. On the contrary, it is a suit brought to recover money obtained by the defendant from the plaintiff, not upon the void contract of insurance, but by the fraud of the defendant. True, the plaintiff might, at common law, upon the facts, have maintained *assumpsit* for money had and received by the defendant to the plaintiff's use, and the law, in the interest of justice and by way of promoting the remedy, which was in form *ex contractu*, would have implied a promise on the part of the defendant to pay. But this would not have been a contract arising out of the void and illegal one, nor in any respect an affirmance of its validity, but only an implication or fiction of law, that upon the facts—the plaintiff being entitled *ex æquo et bono* to recover the money which the defendant had wrongfully obtained from it—he promised to repay the same.

The case of *Catts v. Phalen*, 2 How. 378, is directly in point and decisive of the one at bar upon this question. In it the supreme court held that when a person was employed to draw an illegal lottery and secretly procured a ticket therein to be purchased in the name of another for himself, and thereafter fraudulently pretended that such ticket drew a prize of fifteen thousand dollars, which was paid by the proprietors in ignorance of the fraud, they might maintain an action against the drawer to recover the amount so fraudulently obtained. In delivering the opinion of the

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court, Mr. Justice Baldwin said: "The facts of the case present a scene of deeply concocted, deliberate, gross, and most wicked fraud, which the defendant neither attempted to disprove nor mitigate at the trial, the consequence of which is, that he has not, and cannot have any better standing in court than if he had never owned a ticket in the lottery, or it had never been drawn. So far as he is concerned, the law annuls the pretended drawing of the prize he claimed; and in point of law, he did not draw the lottery; his fraud avoids not only his acts, but places him in the same position as if there had been no drawing in fact, and he had claimed and received the money of the plaintiffs, by means of any other false pretence, and he is estopped from avowing that the lottery was in fact drawn. * * *

The transaction between the parties did not originate in the drawing of an illegal lottery; the money was not paid on a ticket which was entitled to draw the prize; it was paid and received on the false assertion of the fact; the contract which the law raises between them is not founded on the drawing of the lottery, but on the obligation to refund the money which has been received by falsehood and fraud, by the assertion of a drawing which never took place. To state is to decide such a case."

So here, assuming, as this defense admits, that this money was obtained from the plaintiff as alleged in the bill, the trust or contract which the law raises or implies between the parties is not founded on the illegal contract of insurance, but on the obligation of the defendant to refund the money which he obtained from the plaintiff by falsehood and fraud—by the assertion and representation of a death which never took place. To state such a case is to decide it also. Indeed, it appears to me, that if the defendant had robbed the agent of the plaintiff in this state of this money on the highway, he might with as good grace defend an action to recover the stolen property on the ground that the plaintiff was not authorized to do business in this state, as in the present case. Although the defendant was not authorized to do an insurance business in this state, this fact

did not license the defendant to rob or defraud it under pretence of doing such business with it.

The answer also makes the objection that the plaintiff is not capable of suing in this state, because, as alleged, it has not yet properly complied with the laws of this state authorizing it to do business here. But without stopping to consider whether this objection should not have been taken by plea in abatement or what is the effect of the proof upon the point, it is sufficient to say that the plaintiff, being a citizen of Wisconsin, may sue in this court whether it is authorized to do business in the state or not. The state cannot deprive a citizen of another state of the right to sue in the national court, nor has it attempted to do so. The "business" which a foreign insurance company is prohibited from doing in this state before complying with its laws, is the business of insurance, and not the mere bringing or maintaining of a suit in this court.

It only remains to dispose of the question of fact—did Jeremiah Elliott obtain this money from the plaintiff by means of false representations as to the death of Moses, as alleged in the bill? The joint answer of Jeremiah and Arty Mesy, his wife, denies the allegations of the bill in this respect, but while Jeremiah was examined as a witness on his own behalf, before the examiner, the wife was not produced. The reason for this omission is left to be inferred from the circumstances, but it is not improbable that the wife might verify an answer before a notary with her husband, that she could not or would not support in detail upon a cross-examination by counsel before the examiner. Besides, there are three sons of the defendant Jeremiah—Madison, Marion, and Andrew—and one daughter—Mary Ann—who ought to be material witnesses in this case, and have not been called or examined by him; and the first of these, Madison, is a defendant in this suit, who has answered, simply denying the fraud "as to himself."

The evidence taken is quite voluminous and in some material particulars conflicting and unsatisfactory. But the weight and direction of all the evident and controlling facts in the case tend strongly to the conclusion

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that the money was obtained from the plaintiff by fraud—that Moses Elliott was not drowned in the Columbia, but at the commencement of this suit was still alive and practically living with the Elliotts, under the assumed name of Frank Williams.

It is admitted, or satisfactorily appears from the evidence, that in September, 1869, Moses Elliott came from Iowa to the Pacific coast, and that in June, 1870, the father and mother, with their children, Madison, Marion, Andrew, Eldora, and Mary Ann, came to Portland direct from Iowa, and that Moses was either here at the time or came with them from Nevada. The father and sons got employment at the Eagle Cliff cannery, on the lower Columbia, and in the fall the family moved to Columbia county, Oregon, near Westport, where Jeremiah took up a quarter section of land under the pre-emption law, upon which he lived until his removal to Jackson county, in the fall of 1873. W. H. Dear-doff, a half-brother of Arty Mesy's, and who came to Oregon some time before the Elliotts, lived with them. The house was a small cabin of two rooms, built of old, round logs, and contained very little furniture, and that of no value. Neither the father nor the sons appear to have had any special trade or vocation. Moses worked some in the cannery and getting out piles and stave timber, but preferred hunting, to which he was much addicted. The mother took in washing; and, to all appearances, they were very poor—living from hand to mouth, and so represented themselves to the neighbors.

At the time the insurance was effected with the plaintiff on the life of Moses, he was a poor, illiterate youth of eighteen or twenty years of age, without any one specially dependent upon him or interested in his life, and without any particular means of making money enough to support himself and pay a yearly cash premium of one hundred and four dollars, which he might reasonably expect to do for the next forty years, and for the benefit of he knew not whom. At the same time he had a ten-year endowment policy in the Union Mutual of Maine, upon which the yearly premium was two hundred and seventeen dollars, and which

was countersigned and probably delivered at Chicago, Illinois, on August 30, 1869, thus making the yearly premiums which Moses undertook to pay, three hundred and twenty-four dollars.

It is also morally certain, that this insurance upon the life of Moses, although obtained in his own name, and apparently for his benefit, was really procured and carried by the father, and intended for his use and benefit. It appears he was present when the application was made to Gibson, and evidently conducted the negotiation, and within a short time after the policy was received, without any consideration or excuse therefor, assigned it to himself, "for his sole use and benefit"—signing the name of the assured to the assignment, as if the instrument was his own, and the boy's name had been merely used in the transaction as a convenience or make-believe.

The defendant Jeremiah alleges that on June 24, 1871, Moses Elliott, while assisting his uncle, W. H. Deardoff, with a raft on the Columbia river, a few miles below Westport, fell into the river and was drowned; that no person witnessed the circumstance, except said Deardoff, and he reported the fact to the defendant, who searched for his body, but was unable to find it. The plaintiff alleges that this story is a falsehood, devised by the defendant to enable him to fraudulently collect the insurance on Moses' life.

It appears from the evidence that Jeremiah, after procuring the payment of the insurance on Moses' life in the fall of 1873, went to Jackson county, Oregon, where he purchased the real property and sheep mentioned in the bill, with a portion of said money, and before the close of the year removed his family there, where he has ever since resided; that soon after Moses Elliott made his appearance in that country under the assumed name of Frank Williams, where at first he kept in the mountains and followed hunting, but after a time herded sheep with and for the Elliotts in the mountain ranges, and lived with them in the settlement much of the time, claiming to be a cousin of the Elliott boys, and was at the house of Jeremiah on the night of October 20, 1879, when the process in this case was

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served on the latter; that he left the neighborhood the next day with the knowledge of Jeremiah, and has not been seen or heard of since.

There is conflicting evidence as to the identity of Moses Elliott and Frank Williams, but that which denies it is from some of the Elliotts and persons who never saw Moses before he was said to have been drowned. The circumstance most relied upon to disprove the identity is a difference in height and beard. But between 1870 and 1875 or 1879 there was probably a marked change in both the height and beard of a youth of the age of Moses. And nothing is more unreliable than the guess of the average person as to the height of another—particularly when that other is absent or out of sight. It is probable that a person's ordinary acquaintances will, particularly in his absence, differ as much as two inches in estimating his height. From the evidence I conclude that Frank Williams is very near five feet eleven inches high—not to exceed that.

The defendant Jeremiah, in his affidavit of October 11, 1872, says he thinks that Moses was five feet nine inches high "at the time of his insurance"—in the fall of 1870. Between then and 1879 or 1875 it is probable that he grew an inch, and the other inch, or part of one, may be fairly accounted for by the ordinary difference in estimates of height.

But there is a circumstance in favor of the identity of the persons about which there is no doubt, that outweighs all such supposed differences in height and beard. Moses Elliott had lost the two middle fingers of his right hand just below the middle joint, and so has Williams. Those of the former were cut off when he was a mere child by a hatchet in the hands of his brother, and the appearance of Williams' hand shows plainly that he lost his in early life. It may be possible to find two men in the world thus similarly marked, but barely so; and the fact is sufficient, in the absence of any well-established and controlling circumstance to the contrary, to establish identity. If, notwithstanding the similar loss of the fingers, it satisfactorily appeared that Frank had coal-black hair and eyes, while

Moses had bright red hair and blue eyes, then the evidence of identity from this fact would be overcome, for it is even more probable that two men should be so similarly wounded in the hand, than that the same person should have red hair and blue eyes in 1870, and black hair and eyes in 1875 or 1879. But there is no such contradictory and controlling circumstance in this case. On the contrary, every particle of the evidence entitled to credence points with more or less directness and certainty to the conclusion that Moses Elliott and Frank Williams are one and the same person.

Again, there is the direct and positive testimony of John Dunn. He is a disinterested witness, and his position and employment indicate that he is reliable. He worked in the Eagle Cliff cannery in 1870, when Moses Elliott was there, and has been foreman of the establishment for the past four years. He says he worked in the same cannery with Moses for a month or more, and during that time ate at the same table and slept in the same house with him. In October, 1879, at the request of the agent of the plaintiff, he went with Mr. Neill, the prosecuting attorney of Jackson county, to the cabin on the sheep ranch, where Frank Williams was staying—saw him, and heard Neill talk with him, and he swears unqualifiedly that he is the Moses Elliott whom he knew at the cannery.

But the failure of Jeremiah to produce the best evidence upon this point, or to account for not doing so, is a circumstance that warrants the inference that such evidence would have been in favor of the identity. W. H. Deardoff is the half brother of Arty Mesy, and is the only witness of the alleged drowning of Moses. He came to Oregon two years before the Elliots, and lived with them in Columbia county—at least until 1872. He was present when Gibson was applied to for the insurance on Moses' life, and seems to have taken some interest in the transaction. He knows, if any one does, whether Moses was drowned or not, and whether Frank Williams is his *alias* or not. Frank Williams lived with and about the defendant for years before the commencement of this suit. His testimony upon the

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subject of his identity and particularly an inspection of his person would be very material in this case.

Why are not these persons examined as witnesses, or the failure to do so accounted for? They are the relatives and friends of the defendant, and may reasonably be supposed to be within his control or knowledge, and willing to assist him if they could. The reasonable inference is that the defendant dared not call them, and that in the case of Williams he sent the witness out of the country as soon as he was aware of the commencement of the suit.

Neither is Madison Elliott called. He is the son of the defendant, and lives near him, and ought to be able to state whether Frank Williams is Moses Elliott or not, and the inference is that the defendant knew or thought he would not testify against their identity, and therefore did not examine him. So with the mother, Arty Mesy Elliott; she knows whether Frank Williams is the child she bore and "called his name Moses" or not. And although she has in the joint answer of herself and husband affirmed in effect that they are not identical, I cannot but think that if such was the fact she would have been examined as a witness upon that point, and given an opportunity to say so explicitly, subject to cross-examination.

By way of preventing the real property mentioned in the bill from being taken to satisfy any decree which the plaintiff may obtain in this case, the defendant, Jeremiah, has set up and testified to a story to the effect that this property was bought with the separate funds of his wife. In brief it is this: That Jeremiah and Arty Mesy were married in Ohio, in 1843, and in 1857 the latter received from her father's estate one thousand five hundred dollars, which, in 1858, they converted into gold and carried with them to Iowa, where they kept it until the advent of greenbacks, when they exchanged the gold for the latter and then invested these in 5-20's, so as to swell the amount to two thousand five hundred dollars; that in 1870 they brought two thousand three hundred dollars of these bonds to San Francisco, where they exchanged them at par for gold and brought the gold to Oregon, where they kept

Points decided.

[January,

it "under lock and key, in an elk-skin purse," until the fall of 1873, when the defendant purchased this property with two thousand and twenty-five dollars of this money, and took the conveyances therefor to his wife.

In the light of the established circumstances of the case, the story is a very improbable one, and the contradictions and absurdities with which Jeremiah Elliott has filled his testimony, in the attempt to support it, make it utterly unworthy of belief. When the plaintiff paid him with a check on New York, he gave the same to the National bank of this city for collection, but apparently he was in such urgent need of money that he could not wait from the first to the eighteenth of the month, when the collection was telegraphed, but got six hundred dollars on interest from the bank on the security of the check, and yet he testifies that at that very time his wife had two thousand three hundred dollars in gold lying idle, and he had nine hundred and fifty dollars of his own in bonds.

In the language of the court in *Catts v. Phelan*, *supra*, this transaction seems to have been, on the part of Jeremiah Elliott, "a deeply concocted, deliberate, gross, and most wicked fraud." There must be a decree that the plaintiff recover of the defendant, Jeremiah, the sum of seven thousand nine hundred and thirty-one dollars and ninety-seven cents, with legal interest from October 1, 1873, together with costs, and that the property mentioned in the bill be held by the parties claiming it in trust for the plaintiff, and that the same be sold to satisfy this decree.

IN RE SOUTH MOUNTAIN CONSOLIDATED MINING COMPANY, BANKRUPT.

DISTRICT COURT, DISTRICT OF CALIFORNIA,
JANUARY 10, 1881.

1. STOCKHOLDERS OF MINING CORPORATION—LIABILITY—ASSESSMENTS.—The stockholders of mining corporations organized under the laws of California, as the bankrupt corporation in this case was organized, incur no liability *ex contractu*, either express or implied, to pay in, either for the

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prosecution of the enterprise or the payment of the debts of the company, the nominal par value of their shares.

2. **PERSONAL LIABILITY FOR ASSESSMENTS.**—Unless stockholders of a corporation have subscribed for stock, or are the successors of subscribers, assessments levied on their stock can be enforced only by the sale of their shares.
3. **SECTION 349 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE** does not create any personal liability for assessments, unless, from the terms of the stockholders' subscription, such liability was incurred.
4. **THE REMEDY OF CREDITORS** against the stockholder personally is limited and defined by section 322 of the code.

Before HOFFMAN, District Judge.

James A. Waymire, attorney for creditors.

A. L. Rhodes, J. B. Crockett, and W. H. H. Hart, of counsel.

McAllister & Bergin, attorneys for William Willis.

HOFFMAN, J. At the request of counsel, I indicate the grounds for the denial of the application heretofore made, to order an assessment to be levied on the shareholders of the above corporation. The assessment is asked for with the object of collecting the same by suits *in personam* against delinquent shareholders. The question whether they are personally liable must, therefore, first be determined.

I do not question the power of the court to compel contribution of unpaid subscriptions to the capital stock of an insolvent corporation for the purpose of paying its debts. (*Upton v. Tribilcock*, 91 U. S. 48; *Sanger v. Upton*, Id. 60; *Chubb v. Upton*, 95 Id. 665; *Pullman v. Upton*, 96 Id. 328; *Turnbull v. Payson*, 95 Id. 420; *Bank v. Case*, 99 Id. 528; *Hatch v. Dana*, 100 Id.)

Nor do I deny that a promise to pay for shares of stock will be implied from the fact of subscribing for them. (14 Wend. 20; 12 Conn. 499; 2 Metc. (Ky.) 314; 13 Ill. 514; Id. 504.)

And the acceptance and holding of a certificate of stock will have the same effect. (91 U. S. 48; Id. 60.)

Nor is it necessary to create a liability as stockholder that a certificate shall have been issued. (37 Me. 76; 19 Pick. 564; 32 Md. 393; 22 N. Y. 551; 16 Mass. 94.)

Payment of assessments will estop an unregistered transferee of shares from denying his liability as a shareholder. Serving as director or voting at stockholders' meetings will have the same effect. (60 Me. 468; 36 Miss. 17; 31 Pa. St. 489; 38 Id. 81; 6 Man. & G. 81.)

The acceptance of an assignment of a certificate in blank will fix the liability as stockholder. (3 Biss. 524.)

If a subscription be obtained by fraud, it must be promptly repudiated. (91 U. S. 45; 95 Id. 667.)

Nor will ignorance of the law relieve the stockholder. (91 U. S. 45.)

Nor can the corporation release the stockholder from his liability so far as creditors are concerned; nor can it accept any other mode of payment than money, unless full value be given. (91 U. S. 60; 21 Wend. 296; 16 N. Y. 459.)

The fact that the company may forfeit and sell the shares of a delinquent stockholder does not impair the rights of a creditor against him. (Ang. & Ames on Corp., secs. 549, 550; Thompson on Liab. of Stockh., sec. 193, and cases cited.)

All these positions which the counsel for petitioners have maintained in their able and elaborate brief, I concede.

These principles apply to all cases where an obligation has been created or incurred on the part of the stockholder, to pay to the corporation a certain sum, being the par value of the capital stock subscribed for or transferred to him. The liability thus created grows out of contract, express or implied, and the creditors of the corporation may avail themselves of it, as of any other *choses in action* or equitable assets of the corporation, on well-settled and familiar principles.

But the question in this case is: Does the acceptance of stock in a mining corporation, as they are usually formed in this state, create any obligation, either by contract or under the law, to pay to the corporation or to its creditors the nominal par value of the stock so accepted?

The mode in which mining companies are formed in this state is familiar to us all. The owners of the property, or persons expecting to become such, by complying with a few

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simple formalities, form themselves, with such others as they may take into the association, into a corporation, to which the property is conveyed. The amount of the capital stock, which is required to be stated in the certificate of incorporation, is usually fixed at a purely arbitrary sum, and divided into as many shares as convenience or caprice may dictate. It neither bears nor is intended nor supposed by the public to bear the slightest relation to the real value of the property—a value nearly always conjectural, and very often imaginary. It has recently become the practice to divide the capital stock into one hundred thousand shares of the value of one hundred dollars each, making ten millions of dollars in all, a sum which, it is apparent, can have no reference to any estimate of the real or intrinsic value of what is usually a mere hole in the ground, supposed to afford favorable indications.

A striking proof of this is afforded in the present case. Among the first acts of the corporation was to place (in effect) five thousand shares of their stock on the market at the price of one dollar per share. The organization having been effected and the property conveyed to the company, the stock is issued to the former owners, to the amount which may have been previously agreed upon. The remainder is reserved for working capital, or disposed of in the market for such prices as the value and prospects of the enterprise may justify. The purchaser is, of course, careful to know into how many shares the stock is divided, but he is wholly regardless of the nominal and purely arbitrary par value attributed to the shares. No subscription paper, memorandum of association, deed of settlement, or other document creating either expressly or impliedly any *ex contractu* obligation to take and pay for, at their nominal par value, any shares of stock, is signed by any of the shareholders.

This general account of the mode of organizing mining companies in this state describes with sufficient accuracy what was done in the case at bar. The requirements of the statutes of this state, with regard to mining corporations, were strictly complied with. I am unable to perceive how

any *ex contractu* obligation on the part of the shareholders to take and pay for their stock was created. It may be confidently affirmed, that in no case of this description has such an obligation or liability been *intended* to be created. It has on all hands been supposed that the resources of such corporations were to be derived from the sale of reserved stock, or by levying assessments, with the power of selling delinquent stock. Creditors are protected by the personal liability of each shareholder for his *pro rata* share of the indebtedness of the corporation.

It was urged on the part of the stockholders, that the shares held by them are to be treated as fully paid-up stock. I do not concur in this suggestion. It might have some plausibility in cases where all the stock has been distributed among the owners of the mine in proportion to their respective interests. But where stock has been reserved, and subsequently sold at perhaps one hundredth part of its nominal par value, it can in no sense be called or treated as fully paid-up stock.

But even in the case of shares distributed among the mine owners, the view suggested seems to me inadmissible. It is a pure fiction. The mine owners do not, in fact, agree to take the stock and pay for it at its nominal par value—payment to be made by conveying the mining ground at a valuation extravagantly in excess of its real value. If they had really contracted any obligation to take and pay for the stock, they could not acquit themselves of it by such a device. (*Sanger v. Upton*, 91 U. S. 60; 21 Wend. 296; 16 N. Y. 459; 14 Johns. 228; 9 Id. 217.)

To call the stock fully paid up is to admit the obligation to take and pay for it, and to suppose that obligation to have been fulfilled in a mode the law will not permit. In my view, no such obligation *ex contractu* was at any time created.

If the liability to pay the nominal par value of the stock for the benefit of creditors exists, it must arise from the positive provisions of the statutes, and not from the contracts of the parties. This question I will now proceed to examine.

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The statutory provision by which this liability is supposed to be created is found in the three hundred and forty-ninth section of the code of civil procedure. The previous sections of the article of the code contain detailed and minute provisions regulating the levying of assessments, and with regard to the sale of delinquent stock. Section 349 provides that "on the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter, for the collection of delinquent assessments, or any part or portion thereof, and *may elect to proceed by action to recover the amount of the ussessment, and the costs and expenses already incurred, or any part or portion thereof.*" It is this last clause which is supposed to create a legal liability on the part of the stockholders to pay assessments up to the par value of the stock, when necessary to satisfy the indebtedness of the corporation.

But to this view there are grave, and, in my judgment, insuperable objections.

1. The statute does not in terms declare or create the liability. It merely authorizes the directors "to elect to proceed by action to recover the amount of the assessments." Its language would be satisfied by restricting its operation to those cases where such an action can be maintained; that is, to those cases where stock has been subscribed for, and an obligation assumed to take and pay for it. In the case of railroad, telegraph, and wagon-road associations, the articles of incorporation are required to state that at least ten per cent. of the capital stock subscribed has been paid in, and no such corporation can be organized until subscriptions to its capital stock have been obtained in a specified amount for each mile of the contemplated work, and ten per cent. of this amount must be paid in before the articles are filed. (Secs. 291-294.)

By section 290, the articles of incorporation must set forth:

6. "The amount of the capital stock, and the number of shares into which it is divided."

7. "If there is capital stock, the amount actually subscribed, and by whom."

These provisions are retained in the latest amendments to the code, 1880. The only meaning I can attach to them is, that the legislature contemplated two classes of corporations, in both of which the amount of the so-called capital stock and the number of shares into which it is divided, are required to be stated, but in only one of these classes the stock was supposed to be subscribed for, and an obligation incurred to take and pay for it. This latter class includes, as we have seen, railroad, wagon-road, and telegraph companies, and banking, insurance, and other associations based on capital paid in or agreed to be paid in. It is to this class that the clause giving the directors the right to elect "to proceed by action to recover by action the amount of the assessment" must, in my judgment, be deemed to refer.

2. The argument of the learned counsel for the creditors admitted that the liability contended for was limited to an amount equal to the par value of the stock held by the stockholders, and that it could only be enforced for the benefit of creditors. But if the construction of section 349 contended for be sound, I fail to perceive on what grounds this limitation or restriction can be imposed.

Section 331 authorizes the directors of corporations to levy and collect assessments upon the capital stock for the purpose of *paying expenses, conducting business*, or paying debts. The statute nowhere limits the aggregate of assessments that may be levied to the par value of the capital stock, and it has been held by the United States circuit court for this district that an assessment may be levied upon the full-paid shares of a subscriber to stock in a bank, and his shares sold out if the assessment be not paid.

Section 349 confers, as we have seen, the right to proceed by action to recover any delinquent assessment; and if this power be not restricted, as I have suggested, to cases where the stockholder has, by express or implied contract, agreed to pay, it will extend to all cases of assessments levied to meet expenses or conduct business, as well as to

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pay debts, and may be exercised against a stockholder who has paid his subscription in full, or who has already been assessed up to the par value of his stock. This result, startling and absurd as it is, seems to be the necessary consequence of the construction of section 349 contended for.

3. It will not be disputed that the ordinary rule which requires such a construction to be given to the provisions of a statute as will make them consistent and harmonious should be applied to the provisions of our code with regard to corporations.

By section 322, as amended March 15, 1876, the individual liability of a stockholder of a corporation is limited to such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole stock of the corporation; and on payment of his proportion of any debt due from the corporation incurred while he was a stockholder, he is relieved from any further personal liability for such debt. I am unable to reconcile these provisions with a construction of section 349, which would give it the effect and operation contended for.

The court is asked to order an assessment to be levied, in order that the assignee in bankruptcy, representing the creditors, may collect by suit from delinquent stockholders an amount sufficient to pay the debts of this corporation up to the limit of the par value of the shares held by them. The section just referred to limits the personal liability of a stockholder for the corporate debts incurred while he is stockholder to such proportion of those debts as the number of shares owned by him bears to the whole number of shares of the capital stock. But if he is personally liable on the assessment to be levied, he may be obliged, if he is the only solvent stockholder, to pay the whole amount of the indebtedness of the corporation, provided it does not exceed the fanciful and exaggerated par value mentioned in the articles.

If, as in the case at bar, the whole number of shares is one hundred thousand, at one hundred dollars each, the stockholder who owns one thousand shares is liable for one one hundredth part of the debts. If the aggregate indebt-

edness is one hundred thousand dollars, he acquits himself of all personal liability by the payment of one thousand dollars. But if he is liable to the amount of the par value of his stock, he may be compelled to pay one hundred thousand dollars. Will it be contended that a stockholder who has paid his full proportion of the debts incurred while he was a stockholder, would still remain personally liable to pay any assessment that may be levied, and that such a payment, which the statute declares shall relieve him from any further personal liability for such debts, and shall be a good defence in an action brought by a creditor, shall be unavailable in an action brought by an assignee in bankruptcy in behalf of creditors, to collect an assessment levied for the payment of debts? It seems to me that such a position is wholly untenable.

I conclude, therefore:

1. That the stockholders of mining corporations, organized as the corporation in this case was formed, incurred no liability *ex contractu*, either express or implied, to pay in, either for the prosecution of the enterprise or the payment of the debts of the company, the nominal par value of their shares.
2. That unless they have subscribed for stock, or are the successors of subscribers, assessments levied on them can be enforced only by the sale of their shares.
3. That section 349 does not create, and was not intended to create, any personal liability for assessments, unless from the terms of the stockholders' subscription such liability was incurred.
4. That the remedy of the creditor against the stockholder personally is limited, and defined by section 322 of the code, and his liability cannot be extended beyond the limits therein prescribed.

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Points decided.

JAMES D. WALKER v. JOSEPH TEAL.

CIRCUIT COURT, DISTRICT OF OREGON.

JANUARY 10, 1881.

1. **CONDITIONAL LIMITATION—DEMAND OF POSSESSION IN CASE OF CO-TENANTS.**

G. conveyed an undivided interest in certain real property to H., in trust, to secure the payment of a loan from W., with an agreement, that G. might remain in possession and take the rents and profits without account, until the note given for the loan was overdue and unpaid, in which case the trustee was to take possession and dispose of the property to satisfy the debt, and G. was to surrender the possession for this purpose on demand; the note became overdue and remained unpaid, and G. conveyed his interest in the premises to his co-tenant T., and gave him possession, when H. demanded such possession from T., who refused unqualifiedly, and continued to occupy the property and received the rents and profits thereof until the same was sold at a judicial sale, at the suit of H., for less than two thirds of the loan and interest: *Held*, 1. That the interest which G. had in the property, in case the debt was not duly paid, was not an estate upon condition which was not avoided until a demand for possession, but an estate upon a conditional limitation, which terminated with the happening of the contingency—the note becoming overdue and remaining unpaid, without any demand. 2. That the demand for possession required by the agreement was, under the circumstances, not a demand for the purpose of avoiding an estate, and therefore insufficient, unless made exactly for that which the trustee was entitled—nothing more nor less—but was the equivalent of a mere notice to quit by a landlord upon a tenant at will, and was sufficient, although in form it may have included a demand for the exclusive possession of the whole property, the refusal being in effect a denial of the trustee's right to the possession, even as a co-tenant. 3. The trustee being entitled as co-tenant with T. to the possession of the whole property, and the demand having been made by him for possession in pursuance of the agreement, it is to be construed and understood as a demand for possession as such co-tenant, and therefore it was not larger than the right of the party making it, and is sufficient, even if it was to have the effect of avoiding an estate.

2. **CONSTRUCTION OF DIRECTION TO TRUSTEE TO SELL.**—A conveyance in trust to secure the payment of a loan is made primarily for the benefit of the lender, and should be construed, so far as it is open to construction, so as to effect the object for which it was made, and therefore where such a conveyance provided that upon default in the payment of the loan, the trustee should take possession and sell the property upon thirty days' notice: *Held*, that the authority to sell was for the benefit of the lender, and the trustee was not bound to sell until he thought best for the payment of the loan, or was directed to do so by a court of equity, and in the mean time it was his duty to apply the rents and profits upon the debt.

Before DEADY, District Judge.

THE plaintiff, a British subject, brings this action to recover sixteen thousand dollars damages, alleged to have been sustained by him on account of the refusal of the defendant, a citizen of Oregon, to deliver to him the possession of certain real property in Oregon, and wrongfully withholding the same from the plaintiff from July 6, 1877, to November 30, 1878, to wit: the south half of lots 2 and 7 in block 38, and the undivided half of the north half of lot 6, and the undivided half of the south half of lot 7 in block 2 in the city of Portland, from which the defendant received rents during said period at the rate of two hundred and eighty dollars per month, or four thousand seven hundred and four dollars in the aggregate; the undivided half of a certain farm situated in Lane county, and known as the Teal and Goldsmith farm therein, and the undivided half of a certain farm situated in Polk and Benton counties, and known as the Teal and Goldsmith farm therein, the reasonable rental value of which, during said period, was two thousand dollars a year, or two thousand eight hundred dollars in the aggregate; and also on account of the expense incurred by the plaintiff in instituting and maintaining legal proceedings to enforce the sale of said lands over and above what it would have cost to dispose of the same if the defendant had surrendered the possession thereof to the plaintiff, as he was legally bound to do, three thousand one hundred dollars, together with interest.

The defendant demurs to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

Benton Killin, for plaintiff. .

W. Lair Hill and H. Y. Thompson, for defendant. . .

DEADY, J. The facts stated in the complaint necessary to an understanding of the question, made in the argument upon the demurrer, are these:

On August 19, 1874, the defendant Joseph Teal and Ber-

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nard Goldsmith, being the joint owners and tenants in common of the farms in question, conveyed the same to Henry Hewett by a conveyance absolute in form, but, as set forth in a contemporaneous declaration and agreement, signed by the plaintiff and defendant and said Hewett and Goldsmith, to be held by him in trust as a security for the payment of a note then made by said Goldsmith for the sum of one hundred thousand dollars, and made payable to the plaintiff or order, two years after date, with interest at one per centum per month, payable monthly, with a stipulation that if default was made in the payment of the interest for the period of twenty days the whole sum of the note should, at the option of the holder thereof, become due and payable at once.

By the declaration of trust it was stipulated and provided:

1. That Hewett held the legal title to the property, subject to the right of Teal and Goldsmith to retain possession of the same, and to take and have, without account, the issues and profits thereof—they paying all taxes and public charges imposed thereon—until said note should become due and remain unpaid thirty days; 2. That if such default is made in the payment of said note, Goldsmith and Teal “will and shall, on demand, peaceably surrender to said Hewett” the possession of said property, who “may and shall proceed and take possession” of the same, “and on thirty days’ notice in writing to said Teal and Goldsmith * * * requiring them to pay said debt, * * * and on their failure so to pay, shall sell the same at public auction on not more than thirty days’ notice,” or sufficient thereof to pay the debt and charges.

On August 18, 1876, there was due upon said note the sum of ninety-six thousand seven hundred and fifty dollars, when, at the instance of said Goldsmith, it was agreed between the plaintiff and defendant and Hewett and Goldsmith that the time of payment thereof should be extended one year, but upon the stipulation, as aforesaid, that if default was made in the payment of the principal or interest, the whole sum should “become due and payable as provided in said agreement of August 19, 1874;” and the said

Goldsmith, in consideration of such extension, then conveyed to said Hewett the lots in question by a conveyance absolute in form, but, as set forth in said agreement of August 18, 1876, to be held by him as an additional security for the payment of the note aforesaid, and in the manner and for the purposes mentioned in the agreement of August 19, 1874, which agreement was not to be thereby annulled or set aside except so far as the latter might conflict with the former, but the two agreements were "to be taken and construed together."

In April, 1877, Goldsmith made a conveyance of all the property which he had conveyed to Hewett, as aforesaid, to the defendant Teal, and gave him possession thereof. On July 6, 1877, no part of said principal having been paid, nor any of the interest arising thereon after January 21, 1877, "Hewett demanded from the defendant the possession of all said lands in pursuance of the provisions of said contracts," but the latter refused to surrender "any part" of the same, and held possession thereof until November 30, 1878, and received the rents and profits therefrom during said period. All the lands aforesaid have been sold either at private or judicial sale, and the proceeds applied upon the plaintiff's debt, but there is still due thereon from said Goldsmith over fifty thousand dollars; and since April, 1877, he has not had any other property out of which any part thereof could be made.

Upon the argument of the demurrer it was finally admitted by counsel for the defendant, that the plaintiff was entitled to the possession of the property from and after the default was made in the payment of said note—January 21, 1877—provided there was a sufficient demand therefor, and to recover in this action such damages as he may have sustained by reason of the defendant's refusal to surrender the same. But it is contended that the demand, being for the whole property, while the conveyance by Goldsmith to Hewett, except as to the south half of lots 2 and 7, in block 38, aforesaid, only included an undivided half thereof, was too large, and therefore insufficient, citing *Hodgeboom v. Hall*, 24 Wend. 148, and *Bradstreet v. Clark*, 21 Pick. 393.

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Admitting, for the present, that the demand made by Hewett was larger than his right, are the cases cited to show that it is insufficient parallel with the one at bar? In the case of *Hodgeboom v. Hall*, *supra*, there was a devise of an estate to a son, upon condition that he would support his two sisters. The latter, assuming that the condition had been broken and the estate forfeited, brought an action to recover possession of their interest in the property as heirs of the devisor, but the court held, upon the facts, that there was no satisfactory evidence of any demand and refusal of support, and therefore it did not appear that the condition was broken. Here, however, there was a formal demand and refusal, but it is objected that it included more than the party was entitled to. In *Bradstreet v. Clark*, *supra*, an estate was devised upon condition that the devisee pay the legacies given by the will to the children of the devisor. Afterwards the legatees brought an action to recover the possession of the property, upon the ground that the estate of the devisee was forfeited by a refusal on the part of his grantee to pay the legacy of ten dollars due one of them. On the trial it appeared from the evidence, that the demand was made for the three legacies, two of which had been paid by the devisee; and the court held that the demand, although sufficient to support an action to enforce the payment of the legacy, was not sufficient to avoid the estate, likening it to the case of a leasehold estate held upon the condition of paying rent, which is not forfeited by non-payment unless there is also a demand of the precise sum due—neither a penny more nor less.

The legal title to this property was in Hewett, for the benefit of the plaintiff, and he was therefore entitled to the possession and the permanency of the profits from the date of the conveyances to him, but for the stipulation in the declaration of trust, that Goldsmith might have the possession and profits so long as he was not in default upon his note. In effect, the plaintiff having loaned Goldsmith one hundred thousand dollars, and the latter having conveyed this property to Hewett to secure the payment of that sum with interest, the parties agreed that instead of the trustee

taking possession of the property at once, and applying the rents in payment of the interest accruing upon the loan, Goldsmith might remain in possession while he paid the interest. The only interest or estate, then, which the defendant had in this property at the time of the demand, as the assignee of Goldsmith, was the possession—so long as the latter duly paid the interest accruing upon his note, and no longer. This, then, was not an estate upon condition, and therefore it was not necessary that there should have been either an entry or claim (demand) to avoid the estate, upon the breach of the condition, but it was an estate upon a conditional limitation—an agreement for the possession so long as the interest was paid—a possession limited by that contingency, and as soon as it happened the estate terminated, and the right to the possession ceased without any entry or demand upon the part of the plaintiff or his trustee.

The illustration given by Blackstone is in point—"when land is granted to a man so long as he is parson of Dale, or while he continues unmarried, or until out of the rents and profits he shall have made five hundred pounds and the like. In such case, the estate determines (ceases) as soon as the contingency happens." (2 Black. Com. 155; *The Fifty Associates v. Howland*, 11 Metc. 101; Wash. R. P. 319.)

The conveyance to Hewett and the stipulation concerning his right to the possession upon the failure to pay the note having been made for the benefit of the plaintiff, in consideration of and as a security for the repayment of the money advanced by him to Goldsmith, they ought to be construed, so far as they are open to construction, favorably to the former and with a view to effect the object for which they were made.

Goldsmith's right to the possession terminated by his own act—his failure to pay the interest upon his note. Between that time and the demand by Hewett, he or his assignee was a mere tenant at will or by sufferance, and the demand of the possession was only necessary on account of the contract to that effect, and to enable the trustee to maintain an action for the same in case it was refused. In effect, the demand required by the agreement was a mere notice to

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quit, to a tenant holding over after the expiration of his lease or without one.

There is, therefore, no good reason for applying in this case the strict and sometimes absurdly nice rule of the common law touching the nature and effect of a demand which may have the effect to avoid—forfeit—an estate of great value for the non-payment of a comparatively trivial sum as rent or a legacy.

There could be no forfeiture in this case—the defendant had nothing to forfeit. Having failed to comply with the terms upon which he was allowed to remain in possession of the property, his right thereto was already gone, and by the demand he was only required to surrender the possession to the party entitled, and even that only for the purpose of applying the profits upon his debt.

On the contrary, the rule applicable to this demand is the one which governs in the case of an ordinary demand for the possession of property to which the party upon whom it is made has no longer any right; and if it happens that more is demanded than the party is entitled to, it is a good demand so far as he is entitled, if the refusal is absolute and goes to the whole demand.

Nor do I think that this demand was even too large. It is described in the complaint as a demand for “the possession of all said lands in pursuance of the provisions of said contracts,” and it is alleged that the defendant refused to “surrender the possession of any part” of them.

The defendant, as to Goldsmith's interest in the property, stands in his shoes, and had no right, as against the trustee or the plaintiff, that Goldsmith did not have. He took his conveyance with knowledge that the legal title was in the trustee and that default had been made in the payment of interest, and therefore took nothing by it but Goldsmith's right to the possession, which was then reduced to the minimum—the will of the trustee.

As to lots 2 and 7 aforesaid, there is no question about the sufficiency of the demand. Goldsmith was the owner of them in severalty, and the trustee had succeeded to his right, both of property and possession. As to the rest of

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the property, the trustee, as the successor in interest of Goldsmith, was seised as tenant in common with the defendant, and after the default in payment of the note, was entitled, as such tenant, to the possession of the whole of it. Each tenant in common is entitled to the possession of the whole property in common with his co-tenants—"they all occupy promiscuously." (2 Black. Com. 191.) Therefore the demand by Hewett for the possession of all the property owned by him and the defendant jointly, in pursuance of the contracts between the parties to the transaction, was a demand for no more than he was entitled to, that is, for the possession of such property as tenant in common with the defendant.

The refusal of the defendant was absolute, and equivalent to a denial of any right of possession on the part of Hewett. Thereafter his possession of the property, so far as it belonged to the latter, was unlawful, and he is liable in damages to the plaintiff for any loss thereby sustained.

This disposes of the demurrer. That the plaintiff sustained damages by this unlawful withholding of the possession by the defendant is alleged in the complaint, and that he did so in some measure is self-evident.

If the trustee had been let into the possession as provided by the contracts, he would have received the rents and profits for the benefit of the plaintiff—to be applied upon the note. That possession would have continued until the property was sold or the note had been paid. And in such case, the plaintiff would either have received the money arising from the sale or been in the receipt of his share of the rents and profits to have been applied upon the loan. The rents and profits, after deducting the ordinary expenses of keeping the property, are therefore a proper measure for damages which the plaintiff has sustained by the wrongful act of the defendant. The security which Goldsmith gave for the payment of the loan having proved largely insufficient, and a considerable part of that insufficiency having arisen from the fact that the plaintiff or his trustee was deprived by the defendant of the possession of the property from July 6, 1877, until November 30, 1879,

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it follows that the value of such wrongful use and occupation by the defendant is the measure of the plaintiff's damage. (See Or. Laws, p. 589, sec. 38.)

It was also suggested in the agreement for the defendant that the damages, in any event, could be scarcely more than nominal, for the reason that the possession of the trustee could not have exceeded thirty days, as he was bound by the agreement to sell on that time after coming into possession.

But this is altogether a mistaken view of the effect and purpose of the agreement. The power to take possession of the property and to sell it upon the default of Goldsmith was given to the trustee, primarily, for the benefit of the plaintiff. Thereafter Goldsmith's only interest in the property was the right to redeem it by the payment of the loan. He had received the plaintiff's money and in effect conveyed his property to the trustee in payment thereof, so far as it might suffice, subject to his right to redeem the same by the payment of the loan.

The object of the trust was to enable the plaintiff to make his money out of the property in case Goldsmith should prove personally unable to pay, as the result was, and therefore its provisions are to be construed and applied with a view to that end. Now, while the trustee could not sell unless after thirty days' notice to Goldsmith to pay and upon thirty other days' notice of such sale, yet he was not bound to sell until he thought best, or it may be until he was required to do so by the direction of a court of equity. It was his right and duty to take possession of the property and keep, manage, and dispose of it so as to best conserve and promote the interest of the plaintiff, and neither Goldsmith nor the defendant, as his assignee, had any right to impede or control him in the exercise of this power, so long as he kept within the terms of the trust.

For instance, it is admitted that the trustee had a right to take possession of this property and to sell it. But certainly it could not have been contemplated by the parties, that he was absolutely bound to sell in sixty days after taking possession, without any reference to the state of the market or

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what it would bring. As, and when it was sold, the proceeds do not appear to have paid more than two thirds of the debt, whereas, if the trustee had been admitted into possession, he might have applied the rents and profits on the interest, and ultimately paid the whole debt by a favorable disposition of the property. However this may be, the person directly and primarily interested in the matter was the plaintiff, and the agreement ought to be construed so as to allow him to exercise his judgment, whether to hold the property or sell it. The debtor could always protect himself against any abuse of this discretion, to his prejudice, by paying the debt and redeeming the property, or by the interference of a court of equity.

As to the claim for damages on account of the plaintiffs being compelled, by reason of the defendant's refusal to surrender the possession, to bring and maintain a suit in equity to procure a sale of the property, it was not argued by counsel, and need not now be considered.

It, at least, appears from the complaint, that the plaintiff is entitled to recover damages for withholding the possession of the property during the period alleged, and therefore the complaint states a cause of action.

The demurrer is overruled.

D. CAHN v. ELISHA BARNES.

CIRCUIT COURT, DISTRICT OF OREGON.

JANUARY 17, 1881.

1. PATENT—CONTRADICTION OF, BY ORAL EVIDENCE.—On March 12, 1860 (12 Stat. 3), congress granted the swamp and overflowed lands in Oregon to the state to be identified and patented by the secretary of the interior; on July 5, 1866 (14 Stat. 89), congress granted to the state, to aid in the construction of a wagon-road from Albany to the eastern line thereof, three sections per mile of the public lands to be selected within six miles of said road as the same might be located, and on June 18, 1874 (18 Stat. 80), authorized patents to issue therefor as fast as the same should be selected and certified; and on June 19, 1876, a patent was issued under said wagon-road grant to the state, or its assigns, for the premises in controversy: Held, that the patent was conclusive evidence at law that the premises were included in the wagon-road grant, and were therefore not

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swamp land—the latter conclusion being a necessary element of the former.

2. ESTOPPEL.—In 1871 the premises in controversy were selected and approved by the land department as a part of the wagon-road grant without objection on the part of the state or any attempt to show that they were swamp, and in 1872 the state sold the same to the defendant as swamp, and the defendant is in possession without having paid the purchase money: *Held*, that the defendant has no title, and cannot prove title in the state under the swamp land grant, because the state is estopped to deny that the premises are within the wagon-road grant.

Before DEADY, District Judge.

E. C. Bronnough, John W. Whalley, and M. W. Fechheimer,
for plaintiff.

W. Lair Hill, for defendant.

DEADY, J. This action is brought by a citizen of California against a citizen of Oregon, to recover the possession of section 3 of township 15 south, of range 16 east of the Wallamet meridian.

The plaintiff claims to be the owner of the premises and entitled to the possession thereof as the successor in interest of the state of Oregon.

The defendant only defends for the north-east quarter of the section, and pleads title thereto in the state of Oregon under the swamp land act of March 12, 1860 (12 Stat. 3), and that he is in possession under the state, in pursuance of an executory contract of purchase therefrom, under the act of October 26, 1870 (Ses. Laws, 54), providing for the selection and sale of said swamp lands.

The plaintiff denies that the premises are swamp land in fact, and alleges that the secretary of the interior has decided otherwise; and also, that the state, by accepting a patent from the United States of the land in controversy as wagon-road land, is estopped now to assert that the land is swamp, which estoppel binds the defendant, the state's vendee.

The case was tried by the court without the intervention of a jury.

On the trial, a stipulation was read containing the evi-

dence in the case, except as to the question of whether the premises are in fact swamp land or not, and as to that, oral evidence was received subject to the objection of the plaintiff for incompetency.

The facts of the case are as follows:

On July 5, 1866, congress, "to aid in the construction of a military wagon-road" from Albany, *via* Canyon City, through the Cascade mountains to the eastern boundary of the state, granted to the state the "alternate sections of the public lands designated by odd numbers, three sections per mile, to be selected within six miles of said road." (14 Stat. 89.)

The act making the grant contains a provision that not exceeding thirty sections of the grant "shall be disposed of"—sold—when and as fast as the governor of the state "shall certify to the secretary of the interior that any ten continuous miles" of the road are completed. By an act of July 15, 1870 (16 Stat. 363), congress changed the line of the road from Canyon City to Camp Harney; and by the act of June 18, 1874 (18 Stat. 80), it was provided in effect, that whenever it appeared from "the certificate of the governor," as in the act of July 5, 1866, provided, that said road was "constructed and completed," a formal patent should issue to the state or any corporation, being its assignee, "for said lands," "as fast as the same shall, under said grant, be selected and certified."

By the act of October 24, 1866 (Ses. Laws, 58), the state transferred the grant, "for the purposes and upon the conditions and limitations" contained in the act making the same, to the Wallamet Valley and Cascade Mountain Wagon-road Company—a corporation duly organized under the laws of Oregon, in 1864.

On August 19, 1871, said corporation conveyed the premises in controversy to H. K. W. Clarke, who on September 1, 1871, duly conveyed the same to the plaintiff.

That the premises are included in a list of lands, numbered one, and described as "lands granted to the state of Oregon by the act" of July 5, 1866, aforesaid, to aid in the construction of said military wagon-road, and on May 2,

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1871, the commissioner of the general land-office recommended said list for approval as being the lands to which the state was entitled under the grant of July 5, 1866, and therein certified "that it is shown by the certificates on file of the governor of Oregon, bearing date April 1, 1868, September 8, 1870, and January 9, 1871, that said corporation had completed its road from Albany to the 36.8 section, distance three hundred and sixty-eight miles, in conformity with the provisions of said act of congress of July 5, 1866, and the amendatory act of July 15, 1870;" which list was, on May 4, 1871, approved by the secretary of the interior, "subject to any valid interfering right which may have existed at the date of selection of said lands;" that on June 19, 1876, the United States, by its proper officers, issued a patent to the state "for the use and benefit of said corporation and its assigns," purporting to grant the lands in controversy, and transmitted it to the governor of Oregon, who "received" the same "and caused it to be recorded in the counties wherein the lands therein described are situated."

The act of October 26, 1870, *supra*, entitled "an act providing for the selection and sale of the swamp and overflowed lands belonging to the state of Oregon," by operation of the swamp land act of March 12, 1860 (12 Stat. 3), extending over Oregon, the Arkansas swamp land act of September 28, 1850, provided for the selection of such lands by persons employed by the state, and the sale of the same in unlimited quantities, at not less than one dollar per acre, the purchaser to pay twenty per centum of the purchase price within ninety days after the selection is completed, and the balance upon proof that the land "has been drained or otherwise made fit for cultivation;" but if such final payment and proof of reclamation are not made within ten years from the time of the first payment, the land is to revert to the state; and it is declared in the act "that all swamp land which has been successfully cultivated in either grass, the cereals, or vegetables, for three years, shall be considered as fully reclaimed."

The premises are situate to the east of the Cascade moun-

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tains, and on the north bank of the Ochoco creek. The defendant went into that country from the Wallamet valley with stock, when it was unsettled, in the fall of 1867, and selected the place in controversy because it was good meadow land, and lived thereon seven or eight years, during which time he cultivated a garden of less than an acre in extent, and annually cut the wild grass from about one hundred acres of it, without, it appears, making any claim to the premises under any act of congress, until in 1872, as hereinafter stated. The United States surveys were not extended over the premises until October, 1869, but no notice thereof was given to the governor by the secretary of the interior until some time in 1872, in which year the state selected the premises as swamp and overflowed lands, and on September 18, 1872, the defendant purchased the same therefrom under the act of October 26, 1870, *supra*, and paid thereon twenty per centum of the purchase price, but has not yet paid the balance on or done anything to reclaim the same, except to cut an inconsiderable ditch thereon, since the commencement of this litigation; that the land, if thoroughly drained, would be thereby injured and depreciated in value; and no lists or plats of swamp lands embracing the premises in controversy have been made or filed, or transmitted to the governor of this state by the secretary of the interior."

The first and material question to be decided in this case is, whether the patent issued to the state under the grant of July 5, 1866, for the premises in controversy, is conclusive evidence in this action, that they belong to the wagon-road grant, and not to the swamp land one.

The swamp land grant was a grant *in presenti* of all the swamp and overflowed lands in the state thereby made "unfit for cultivation," but the determination of what lands come within this category and what do not, rests with the secretary of the interior, and his decision is final, unless impeached for fraud or mistake. (*French v. Fyan*, 93 U. S. 170.) The provision in section 2 of the act of March 12, 1860, *supra*, which requires the lands "already surveyed" to be selected within two years from the adjourn-

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ment of the next session of the legislature, and those to be surveyed within two years from the adjournment of the next session, after notice by the secretary of the interior to the governor "that the surveys have been completed and confirmed," is not in the original swamp land act. The effect of it appears to be that it is the duty of the state to make the selections in the first instance and submit them for approval to the secretary, and that if this is not done within the term prescribed, the grant reverts. But however that may be, the power to ultimately determine what land passes under the grant as being "wet and unfit for cultivation" still rests with the secretary.

The statutes of the United States provide that the secretary of the interior is charged with the supervision—final direction—of the public business relating to the public lands, and that the commissioner of the general land office shall perform under his direction all the executive duties appertaining, among other things, to "the issuing of patents for all grants of land under the authority of the government." (Sections 441, 453, R. S.) And by section 2 of the swamp land act it is made his especial duty to determine what lands are within its purview.

The wagon-road grant was a grant *in presenti* also of the odd sections for six miles on either side of the road, wherever it might be located, between the *termini* named, which, so soon as the line of the road was designated, attached to such sections within the prescribed limits on either side of said line, and took effect from the date thereof. (*Shulenberg v. Harriman*, 21 Wall. 60.)

But the grant to the wagon-road being subsequent in point of time to that of the swamp land, the former could not attach to any legal subdivision within the operation of the latter, unless they had reverted to the United States for want of selection in due time, which could not have occurred in this case, as the surveys were not extended over the premises until 1869. And this is so, from the very nature of the case, rather than from the effect of the clause in section 1 of the wagon-road grant, excepting from its operation "all lands heretofore reserved to the United

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States by act of congress or other competent authority”—for the words “reserved to the United States” do not describe or include lands “sold or otherwise disposed of,” as did the reservation in the railroad grant, cited by counsel from *Railway Company v. Fremont County*, 9 Wall. 94, but only Indian and military reservations and the like—lands withdrawn from the public domain for some special use of the United States, and not lands already disposed of to states or others. It is as impossible that two grants should have effect upon the same land as that two bodies should occupy the same space, and therefore the grant that is prior in point of time and has not reverted to the grantor excludes or repels the other.

In *French v. Fyan*, *supra*, the supreme court held that a patent issued under the swamp land act of 1850 cannot be impeached in an action at law by showing that the land which it conveys was not in fact swamp and overflowed land.

Upon the question of admitting oral evidence to contradict the patent in this respect, Mr. Justice Miller, in delivering the opinion of the court, after citing the case of *Johnson v. Twissley*, 13 Wall. 72, to the effect that the action of the land office in issuing a patent is conclusive upon the legal title, subject, however, to the power of a court of equity, in certain cases, to correct or set it aside for fraud or mistake, says: “We see nothing in the case before us to take it out of the operation of that rule; and we are of the opinion that in this action at law, it would be a departure from sound principle, and contrary to well-considered judgments in this court, and in others of high authority, to permit the validity of the patent to the state to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey.”

And in *Sharp v. Stephens*, 6 Saw. 48, this court held, that the defendant could not, at law, prove, in opposition to a

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patent under the donation act, that the person named therein as the wife of the settler, was not his wife, and therefore not entitled to her half of the donation.

Nor was it in allowing and issuing this patent alone that the secretary passed upon the question to what grant the premises belonged. In approving the lists selected under the wagon-road grant in 1871, he did the same thing; for as yet, a patent was not authorized and the grant was complete upon the approval by the secretary of the lists of land selected under it. The patent issued under the subsequent act of June 18, 1874, *supra*, did not pass the title, but is only record evidence of the previously existing grant by statute and the identity of the lands included in it. (*Langdeau v. Hanes*, 21 Wall. 529.)

In the face of *French v. Fyan*, and even upon general principles, counsel for the defendant does not deny but that if the patent had issued to the state for the premises under the swamp land act, it would be conclusive in this action as to the character of the land; but it is nevertheless contended, that the patent actually issued to the state under the wagon-road grant is not such evidence that the lands are not swamp, because in the consideration and determination in the land department of the question whether the premises were within the wagon-road grant or not, the question of whether they were swamp was not necessarily involved, and therefore cannot be said to have been considered or decided.

But this reasoning is more ingenious than sound. The effect of the decision of the secretary does not depend on the existence of an actual or formal controversy before him, carried on by parties adversely interested therein, but upon the fact that it was duly made in the regular course of the administration or execution of the law relating to the subject. Both the swamp land and wagon-road grants were before the department for consideration and patent. Under the circumstances it was the duty of the secretary, in selecting and patenting lands under the wagon-road grant, to ascertain that they were not included in the prior grant of swamp land. And whether, as a matter of fact, this was

consciously and purposely done, with regard to the particular land in controversy or not, in contemplation of law it certainly was. For it was impossible for the secretary to decide, as he did, absolutely, that the land belonged to the wagon-road grant, without, in effect, at the same time deciding that it did not belong to the swamp land grant.

This latter conclusion is a necessary element of the former, and therefore the law considers that before the patent to the premises was issued as and for wagon-road land, it was decided that they were not swamp. (Or. Civ. Code, sec. 726.)

It also appears to me that the state is estopped to say, as against its grantee, this plaintiff, that this is not wagon-road land. The state granted this land to plaintiff's vendor as wagon-road land, and allowed it to be selected and approved as such by the secretary, without objection, long before it sold it to the defendant as swamp land.

The defendant has no title to this property. He is only a purchaser in possession without the purchase money being paid, and stands, therefore, in the relation of tenant to the state whose alleged title under the swamp land act he sets up in bar of the action. It follows that if the state would be estopped to set up this title, or, what is equivalent thereto, to deny that the premises are wagon-road land, the defendant is also.

The state was the grantee in both these grants. It accepted the premises as part of the wagon-road grant, or allowed its grantees to do so, without objection on its part. If, however, the land is swamp in fact, the state must have neglected to furnish the department with the proper evidence thereof. It may have acted thus because it preferred that the land should pass under the wagon-road grant, and thereby be applied in aid of a useful public enterprise. For years after it was made this swamp land grant was not regarded with favor in this state, nor was it thought that there was any quantity of land to which it was properly applicable. It is a matter of history that up to 1870 the state refused to take any steps to secure land under it, because, for one reason, it preferred to make its selections under the

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school land acts, even if damp enough to be called swamp, as in most cases the dampness was a recommendation rather than otherwise. In the mean time this land was selected and approved as wagon-road land with the acquiescence, if not the concurrence, of the state, for the benefit of its grantee, and therefore, it is now estopped to deny directly that it is included in such grant, or indirectly, by alleging that it is swamp land.

A paper was also offered in evidence by the plaintiff, executed by the governor of the state, under the great seal thereof, on October 2, 1871, reciting the grant to the state and the assignment thereof to the wagon-road company, and certifying that the road had been duly constructed and accepted, and that "the lands along the line of said road to the extent of eight hundred and sixty thousand acres, have under said donation and grant passed to and become the absolute property of said company, as a patent or grant from the state, but was not received as such because it did not purport to be a grant or patent but only a certificate, that in the opinion of the executive certain lands, including the premises in controversy, had become vested in the wagon-road company by virtue of the congressional and legislative grants and the subsequent construction of the road, and because it does not appear that the governor was authorized to issue a patent for the premises under any circumstances.

My conclusion is: 1. That the patent is conclusive evidence in this action that the premises are not swamp, and therefore the oral evidence to that effect cannot be considered; and 2. That the state is estopped to deny that the premises are included in the wagon-road grant, and therefore its tenant, the defendant, is also.

Prima facie, the plaintiff has the legal title and is entitled to the possession, and the defendant being precluded from showing that the premises are swamp, it follows, as a matter of course, that the former must recover.

There must a finding and judgment for the plaintiff accordingly.

THE SCHOONER FRITHEOFF.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

FEBRUARY 8, 1881.

1. SEAMAN'S WAGES.—Where wages are admitted to have been earned, but deductions are claimed for payments on account and other offsets, the burden of proof is on the master to show the payments, etc., by a preponderance of proof.

Before HOFFMAN, District Judge.

Daniel T. Sullivan, proctor for libellant.*A. P. Van Duzer*, proctor for claimant.

HOFFMAN, J. There is no dispute as to the amount of wages earned by the libellant on the two voyages, viz., one hundred and thirty-four dollars and ninety-four cents. The captain claims to have paid him on account various sums, the greater part of which the steward admits. The master took no receipts, and kept no accounts. He fails to produce a single written memorandum of any payment whatever. The man having shown himself entitled to a certain sum, it is for the master to show payment in whole or in part. The testimony being conflicting, and there being no circumstances developed which justify me in rejecting the steward's evidence, I must decide the matter against the party upon whom rests the burden of proof and the duty of making out his case affirmatively. The man admits having received thirty-two dollars. He charges the captain one dollar and fifty cents for a pig supplied him. This does not appear to be disputed. I think, too, the evidence shows pretty clearly that two dollars should be charged to him for time lost, and one dollar for a boat, making in all thirty-two dollars and fifty cents to be deducted from gross earnings. If the master is not allowed all the credits for payments on account to which he is entitled, he has only himself to blame for the loose manner in which he conducted his business. It seems incredible that a person owning several vessels, and commanding one, should have failed to obtain receipts or make any writing whatever showing the numerous payments he claims to have made. The

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master also claims an offset against the steward on account of the balance of a lot of cigars given or sold to the steward a year and a half ago, at the beginning of a former voyage. It is not quite clear from the captain's statement what the transaction was, whether a sale to the steward, with the right on the part of the latter to return as many of the cigars as he should be unable to dispose of, or a bailment to him to sell them on the master's account. The steward denies the whole matter and insists that he never bought or had anything to do with the cigars. There is no written memorandum of any kind of the transaction nor any corroborative proof. I must apply the same rule to this claim as to the payments on account. The case is even stronger; for this demand is claimed to have arisen at the beginning or in the course of a voyage long since ended, and for which full settlement was made and the man paid by a draft on this city. Two voyages have since been made by the libellant in the same vessel, and it is to his claim for wages on these that the demand in question is set up as an offset.

It is evidently a stale and, I think, doubtful claim. It is certainly not established by a preponderance of affirmative proof. The most that can be said is, that the proofs are balanced.

I shall allow the claim for six dollars and fifty cents paid by the master to one Richards at libellant's request. His testimony is corroborated by that of another witness.

The four dollars for a woollen shirt I cannot allow, for the reasons above given. The steward denies that he received it; and the master has no testimony but his own oath, against the oath of the steward.

I shall allow the steward eight dollars and seventy-five cents which he appears to have paid for a chart, etc., furnished to the vessel. He bought the articles perhaps without authority, but the captain ratified the purchase, by accepting and appropriating them, and he admits they were needed by the vessel.

I at first thought the captain's claim for fourteen dollars for a gun purchased by the steward, should be peremptorily rejected, as the credit seemed to have been given by the

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what it would bring. As, and when it was sold, the proceeds do not appear to have paid more than two thirds of the debt, whereas, if the trustee had been admitted into possession, he might have applied the rents and profits on the interest, and ultimately paid the whole debt by a favorable disposition of the property. However this may be, the person directly and primarily interested in the matter was the plaintiff, and the agreement ought to be construed so as to allow him to exercise his judgment, whether to hold the property or sell it. The debtor could always protect himself against any abuse of this discretion, to his prejudice, by paying the debt and redeeming the property, or by the interference of a court of equity.

As to the claim for damages on account of the plaintiffs being compelled, by reason of the defendant's refusal to surrender the possession, to bring and maintain a suit in equity to procure a sale of the property, it was not argued by counsel, and need not now be considered.

It, at least, appears from the complaint, that the plaintiff is entitled to recover damages for withholding the possession of the property during the period alleged, and therefore the complaint states a cause of action.

The demurrer is overruled.

D. CAHN v. ELISHA BARNES.

CIRCUIT COURT, DISTRICT OF OREGON.

JANUARY 17, 1881.

1. PATENT—CONTRADICTION OF, BY ORAL EVIDENCE.—On March 12, 1860 (12 Stat. 3), congress granted the swamp and overflowed lands in Oregon to the state to be identified and patented by the secretary of the interior; on July 5, 1866 (14 Stat. 89), congress granted to the state, to aid in the construction of a wagon-road from Albany to the eastern line thereof, three sections per mile of the public lands to be selected within six miles of said road as the same might be located, and on June 18, 1874 (18 Stat. 80), authorized patents to issue therefor as fast as the same should be selected and certified; and on June 19, 1876, a patent was issued under said wagon-road grant to the state, or its assigns, for the premises in controversy: *Held*, that the patent was conclusive evidence at law that the premises were included in the wagon-road grant, and were therefore not

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swamp land—the latter conclusion being a necessary element of the former.

2. ESTOPPEL.—In 1871 the premises in controversy were selected and approved by the land department as a part of the wagon-road grant without objection on the part of the state or any attempt to show that they were swamp, and in 1872 the state sold the same to the defendant as swamp, and the defendant is in possession without having paid the purchase money: *Held*, that the defendant has no title, and cannot prove title in the state under the swamp land grant, because the state is estopped to deny that the premises are within the wagon-road grant.

Before DEADY, District Judge.

E. C. Bronnough, John W. Whalley, and M. W. Fehheimer,
for plaintiff.

W. Lair Hill, for defendant.

DEADY, J. This action is brought by a citizen of California against a citizen of Oregon, to recover the possession of section 3 of township 15 south, of range 16 east of the Wallamet meridian.

The plaintiff claims to be the owner of the premises and entitled to the possession thereof as the successor in interest of the state of Oregon.

The defendant only defends for the north-east quarter of the section, and pleads title thereto in the state of Oregon under the swamp land act of March 12, 1860 (12 Stat. 3), and that he is in possession under the state, in pursuance of an executory contract of purchase therefrom, under the act of October 26, 1870 (Ses. Laws, 54), providing for the selection and sale of said swamp lands.

The plaintiff denies that the premises are swamp land in fact, and alleges that the secretary of the interior has decided otherwise; and also, that the state, by accepting a patent from the United States of the land in controversy as wagon-road land, is estopped now to assert that the land is swamp, which estoppel binds the defendant, the state's vendee.

The case was tried by the court without the intervention of a jury.

On the trial, a stipulation was read containing the evi-

edness is one hundred thousand dollars, he acquits himself of all personal liability by the payment of one thousand dollars. But if he is liable to the amount of the par value of his stock, he may be compelled to pay one hundred thousand dollars. Will it be contended that a stockholder who has paid his full proportion of the debts incurred while he was a stockholder, would still remain personally liable to pay any assessment that may be levied, and that such a payment, which the statute declares shall relieve him from any further personal liability for such debts, and shall be a good defence in an action brought by a creditor, shall be unavailable in an action brought by an assignee in bankruptcy in behalf of creditors, to collect an assessment levied for the payment of debts? It seems to me that such a position is wholly untenable.

I conclude, therefore:

1. That the stockholders of mining corporations, organized as the corporation in this case was formed, incurred no liability *ex contractu*, either express or implied, to pay in, either for the prosecution of the enterprise or the payment of the debts of the company, the nominal par value of their shares.

2. That unless they have subscribed for stock, or are the successors of subscribers, assessments levied on them can be enforced only by the sale of their shares.

3. That section 349 does not create, and was not intended to create, any personal liability for assessments, unless from the terms of the stockholders' subscription such liability was incurred.

4. That the remedy of the creditor against the stockholder personally is limited, and defined by section 322 of the code, and his liability cannot be extended beyond the limits therein prescribed.

JAMES D. WALKER v. JOSEPH TEAL.

CIRCUIT COURT, DISTRICT OF OREGON.

JANUARY 10, 1881.

1. **CONDITIONAL LIMITATION—DEMAND OF POSSESSION IN CASE OF CO-TENANTS.**

G. conveyed an undivided interest in certain real property to H., in trust, to secure the payment of a loan from W., with an agreement, that G. might remain in possession and take the rents and profits without account, until the note given for the loan was overdue and unpaid, in which case the trustee was to take possession and dispose of the property to satisfy the debt, and G. was to surrender the possession for this purpose on demand; the note became overdue and remained unpaid, and G. conveyed his interest in the premises to his co-tenant T., and gave him possession, when H. demanded such possession from T., who refused unqualifiedly, and continued to occupy the property and received the rents and profits thereof until the same was sold at a judicial sale, at the suit of H., for less than two thirds of the loan and interest: *Held*, 1. That the interest which G. had in the property, in case the debt was not duly paid, was not an estate upon condition which was not avoided until a demand for possession, but an estate upon a conditional limitation, which terminated with the happening of the contingency—the note becoming overdue and remaining unpaid, without any demand. 2. That the demand for possession required by the agreement was, under the circumstances, not a demand for the purpose of avoiding an estate, and therefore insufficient, unless made exactly for that which the trustee was entitled—nothing more nor less—but was the equivalent of a mere notice to quit by a landlord upon a tenant at will, and was sufficient, although in form it may have included a demand for the exclusive possession of the whole property, the refusal being in effect a denial of the trustee's right to the possession, even as a co-tenant. 3. The trustee being entitled as co-tenant with T. to the possession of the whole property, and the demand having been made by him for possession in pursuance of the agreement, it is to be construed and understood as a demand for possession as such co-tenant, and therefore it was not larger than the right of the party making it, and is sufficient, even if it was to have the effect of avoiding an estate.

2. **CONSTRUCTION OF DIRECTION TO TRUSTEE TO SELL.**—A conveyance in trust to secure the payment of a loan is made primarily for the benefit of the lender, and should be construed, so far as it is open to construction, so as to effect the object for which it was made, and therefore where such a conveyance provided that upon default in the payment of the loan, the trustee should take possession and sell the property upon thirty days' notice: *Held*, that the authority to sell was for the benefit of the lender, and the trustee was not bound to sell until he thought best for the payment of the loan, or was directed to do so by a court of equity, and in the mean time it was his duty to apply the rents and profits upon the debt.

ident and upon due notice to each director of said defendant, a meeting of said directors was held, at which four thereof were present, when it was unanimously voted that said sum of four thousand and fifty-eight dollars was due the plaintiff and the proceedings of the meeting of April 15th aforesaid duly approved; and on May 7, 1879, said defendant and said Gaston made their joint promissory note for said sum with interest at the rate of twelve per centum per annum, payable to the plaintiff, and on the same day said defendant executed a mortgage on its road and all other property to secure the payment of the same, which was duly recorded on May 14, 1879.

No payment having been made on any of these notes, the plaintiff on January 11, 1879, in pursuance of a stipulation in the mortgages, declared them all due; and on the twenty-third of the same month commenced this suit to enforce the lien of the mortgages to secure the same. Upon the filing of the bill, an injunction was allowed and a receiver appointed. It is not necessary to state the grounds upon which the other parties were made defendants, further than that the Wallamet Valley Railroad Company became by purchase the successor in interest of the Dayton, Sheridan, and Grande Ronde Railway Company, in pursuance of a vote of directors of the latter on January 8, 1879, and a conveyance of its road and franchise on June 5th, thereafter; and that the others had or claimed liens upon the property for the value of services and materials furnished in the construction of the road. Upon the direction of the court, the receiver borrowed money wherewith to put the road in working order and pay the claim of the defendants, U. B. Scott & Co., allowed at one thousand seven hundred and nineteen dollars and five cents, for freight and storage of rails belonging to the road.

The defendants, except the Dayton, Sheridan, and Grande Ronde Railway Company, the Wallamet Valley Railway Company, and Joseph Gaston, answered, setting up their respective claims and liens by mortgage, judgment, and otherwise, and these three defendants answered jointly, admitting the purchase and delivery of the rails and fixtures,

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at the alleged price, but denying the validity of the first and second series of notes and the two mortgages to secure them, made in the name of the Dayton, Sheridan, and Grande Ronde Railway Company, for the reason that the directors were not all present at or notified of the meetings of November 5th and December 4th, at which they were authorized, but admitting the validity of the note and mortgage for four thousand and fifty-eight dollars, and all the notes and mortgages made by Gaston.

By reason of a subsequent ratification of these acts, it is not necessary to decide the question—can a majority of the directors of an Oregon corporation exercise any of the powers vested in the directors without the presence of or due notice to the others? The plaintiff affirms that they can, relying upon the clause in section 11 of the corporation act (Or. Laws, p. 527), which reads—“The powers vested in the directors may be exercised by a majority of them.” But the defendant insists that while a majority may exercise any power vested in the directors, yet they can only do so at a lawful meeting of the directors, that is, a meeting where all are present and may be heard, or have had due notice of the same and might be present if they would.

By stipulation filed April 17, 1880, it was admitted that the plaintiff had received one hundred and nine thousand seven hundred and four dollars and fifty cents in payment of the notes sued on, when the injunction was dissolved and the receiver discharged, but the suit was continued to determine the validity of the claim of the plaintiff to recover attorney's fees, upon which question the case has been argued and submitted.

The claim arises in this way: In each of the mortgages made by the Dayton, Sheridan, and Grande Ronde Railway Company, and also those made by Joseph Gaston, there is a stipulation for the recovery of an attorney's fees, in the event of legal proceedings being taken to recover the same, thereby secured. The sums agreed upon to be recovered as such fee in each case are as follows: For the sum of sixty-two thousand seven hundred and twenty-four dollars and fifty-six cents by the Dayton, Sheridan, and Grande Ronde

Railway Company mortgage, four per centum—two thousand five hundred and eight dollars—of the amount, and by the Gaston mortgage, one thousand dollars; for the sum of twenty-seven thousand one hundred and thirty-four dollars, by the mortgage of the former and the latter, each one thousand dollars; and for the sum of four thousand and fifty-eight dollars, by the mortgage of the former two hundred dollars, in all the sum of five thousand seven hundred and eight dollars.

On January 8 and April 28, 1879, meetings of the directors of the defendant, the Dayton, Sheridan, and Grande Ronde Railway Company, were held, which are admitted to have been duly called and valid. At each of these, action was taken to sell and convey the property and franchise of said defendant, to the defendant, the Wallamet Valley Railway Company, upon the condition that the latter would pay the debts of the former, in which these mortgages were referred to, recognized, and approved.

This statement is substantially admitted by counsel for the defendants, but his contention and argument is, that an authority to the president and secretary of a corporation to make its note and mortgage for a specified sum does not include a contract to pay an attorney's fee, in case legal proceedings are taken to enforce the same. In this case, the vote of the directors only authorized the making of the mortgages for a specific sum, and is silent upon the subject of attorney's fees. But it is contended for the plaintiff that the subsequent recognition and approval of these mortgages must be taken and construed, as applying to every provision contained in them, as they were in fact executed, and not simply to the order in the records of the corporation directing the execution of a mortgage.

As to the question—did the direction to the president and secretary to make the mortgage of the corporation, to secure the payment of a specific sum, also authorize them to insert a contract therein, to pay an attorney's fee to the mortgagee in case the same was sued upon, my opinion is that it did not. They were the special agents of the corporation to do a particular thing—to execute a mortgage—and

if they exceeded this authority, their principal was not bound by it. (Story on Agency, secs. 17, 126.)

It is not claimed that there was any specific authority to insert this contract concerning an attorney's fee in the mortgage; nor is there anything in the nature of the act authorized or the evidence in the case, which tends to show that the insertion of such a contract was implied in the authority to make the mortgage, as being a necessary part of it, or that it was authorized by any general usage or established course of dealing between the parties, in reference to which it might be inferred that they acted in the execution and acceptance of the mortgage. No authorities have been cited upon the point, and I rest the decision of it upon the application of general principles to the particular circumstances.

But it is contended on behalf of the plaintiff that the ratification of these mortgages must be taken and construed as extending to every provision contained in them, as they were in fact executed, and not simply to the order directing their execution. Which of these constructions should be given to this ratification depends upon the evidence, the burden of proof being on the plaintiff, and the rule of the law, "that the ratification of an act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts." (*Owings v. Hull*, 9 Pet. 629.)

It may be admitted that the president and secretary—two of the directors—knew of this provision in the mortgages, but they were not the corporation, nor their knowledge that of the other directors. It should appear that the directors had such knowledge collectively, as a body, but it does not even appear that any of them knew of this contract save the president and secretary.

The directors may be presumed to know what was in their own records, but there was not in them even a suggestion that these instruments contained anything not absolutely necessary to a mortgage. But there is no presumption that the directors had seen these mortgages on the records of the county wherein they were recorded or elsewhere; nor does the fact of such record impart to them, as

directors, or to the corporation, so far as this question is concerned, even constructive notice of their contents.

The reasonable conclusion to be drawn from the evidence is, that the directors referring to and approving of the mortgages, on January 8 and April 28, 1880, theretofore given to the plaintiff, had reference to and approved of only such acts as it appeared from their records that a majority of their body had assumed the right to direct their president and secretary to do and perform.

It follows that the ratification of these mortgages did not include the special provision for an attorney's fee. The fact of its existence does not appear to have been known to the directors at the time of the ratification, and therefore it was not within their contemplation.

The contracts inserted in the mortgages of the corporation by the president and secretary being unauthorized and unratified cannot be enforced against it.

Objection is also made to the enforcement of the contract for an attorney's fee in the mortgages made by Gaston, but upon what ground does not appear. The matter needs only to be stated to show the futility of the objection. Gaston made two mortgages to secure the payment of his promissory notes to the plaintiff for the sums of sixty-two thousand seven hundred and twenty-four dollars and fifty-six cents and twenty-seven thousand one hundred and thirty-four dollars respectively, and expressly agreed therein, that if legal proceedings were taken to enforce the same, that by way of indemnifying the plaintiff against the costs and expenses thereof, it should be entitled to recover against him, in addition to the debt, an attorney's fee of one thousand dollars in each case. This was a lawful contract, lawfully made. (*The Wilson Sewing Machine Co. v. Moreno et al.*, 6 Saw. 35; *Bank of British North America v. Ellis et al.*, 6 Saw. 96.) The contingency has arisen. The mortgagor failed to pay his debt, and the mortgagee has been put to the expense of enforcing his claim by litigation, and is entitled to recover, as against Gaston, and enforce his mortgages, for the sum of two thousand dollars.

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of the principal and interest due the plaintiff, as above stated, and the payment of costs up to that time, and dismissing the bill as to all the defendants except Gaston; and that the plaintiff recover of him said sum of two thousand dollars, and costs and expenses to be taxed, and for a sale of the mortgaged premises by the master of this court if the decree is not satisfied within ten days from the entry thereof.

THE STEAMBOAT S. M. WHIPPLE.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

FEBRUARY 11, 1881.

1. LIEN FOR SUPPLIES.—Where a steamboat was chartered under an agreement that the hirers should pay all expenses for supplies, etc., and redeliver her at the expiration of the charter, free of all liens, and supplies were furnished, for which, by the laws of this state, a lien upon her was created: *Held*, that the vessel was liable unless her owner could show by a clear preponderance of proof that notice of the terms of the charter was given to the supply-men.

Before HOFFMAN, District Judge.

Milton Andros, proctor for appellant.

G. M. Williams, proctor for claimant.

G. D. Hall and *W. W. Morrow*, proctors for several intervenors.

HOFFMAN, J. It is not denied that the supplies were furnished and the repairs made as set forth in the libel of the libellant and those of the intervenors.

At the time these debts were contracted, the vessel was under charter to G. A. Carleton and J. C. Spencer. By the terms of the charter Carleton & Spencer agreed to pay "all bills for wages, coal, supplies, and wharfage, accruing against the steamer during the period of the charter, and also all liens that may have accrued against said vessel since June 14, 1880" (they having had possession thereof since that date under a previous charter); "and further, that they would surrender and deliver the possession of the vessel

* * * absolutely free and clear from all liens and incumbrances accruing, etc., between June 14, 1880, and the time of such delivery." It was further agreed that the charterers should employ the pilot and engineer selected by the owner, the wages to be included in the wages to be paid by them" (the charterers), "and the pilot so selected to be both pilot and captain, and *have charge of the boat.*"

The true and faithful performance by the charterers of the conditions of the charter-party was guaranteed by one Charles Jost. The vessel was a domestic vessel, exclusively engaged in the navigation of the interior waters of this state.

By section 813, California code of civil procedure, all steamers, etc., are made liable, "2. For supplies furnished for their use, at the request of their respective owners, masters, agents, or consignees. 3. For work done or materials furnished in this state for their construction, repair, or equipment. Demands for these several causes constitute liens upon all steamers," etc.

It is contended by the advocate for the claimant, that by the reservation of the right to appoint the master who was to "have charge of the boat," the general owner retained the possession of the vessel, with all the rights and responsibilities of the owner. The supplies were furnished at the request of the master.

The demands of the intervenors, The Phelps Manufacturing Co., J. Boese, and Renton, Holmes & Co., are fully proved. The supplies and materials appear to have been furnished on the credit of the vessel, and without notice of the terms of the charter-party.

With regard to the claim of the Black Diamond Coal Company, an attempt is made to show that the president of the company was notified by Mr. E. V. Joice, agent of the claimant, that the charterers, by the terms of the charter, were to pay for all supplies furnished the vessel, and that neither she nor her owner would be responsible.

Mr. Joice testifies, that in June or July, when Carleton and Spencer were running the boat, he informed Mr. Cornwall, the president of the Black Diamond Coal Company,

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that the boat was to be returned free of charges, and that he must charge the supplies to the charterer. Mr. Cornwall replied, that when he supplied a boat, he always charged her with the supplies. Mr. Joice then requested him to let him know quietly how much was due, and whether the charterers paid up promptly. Mr. Cornwall replied, that there was nothing due then. Two or three weeks after this conversation, Mr. Cornwall furnished him (Mr. Joice) with a statement, showing two hundred dollars to be then due for coal. He had but one conversation with Mr. Cornwall—he thinks it was in June, soon after the chartering of the boat; that Cornwall furnished but one statement. Mr. Joice subsequently returned to the stand, to state that on searching his papers he found a second note from Mr. Cornwall, which had escaped his recollection; but he is positive that he also received the first note spoken of by him.

Mr. Cornwall testifies, that about the first of September, a few days before the note produced by Mr. Joice was written, he had a conversation with the latter, who inquired how much the charterers owed him. Mr. Cornwall replied, that he didn't know, but would send the account to him. Mr. Joice said the boat was chartered, but they had good security. He supposed they (the charterers) would pay their bills, but he didn't want the boat to get too far behind. No notice was given him (Mr. Cornwall) not to trust the boat, but Mr. Joice wanted him to press the parties. Mr. Cornwall states, that this was the first time he knew that the boat was chartered. He did not understand Mr. Joice as giving him notice. If he had, he would at once have given orders not to supply the boat. He further states, that his invariable practice is to keep copies of all his correspondence on business matters; that he finds a copy of the second note written by his bookkeeper, by his orders, and that he gave him instructions with regard to writing but once. In this he is corroborated by Mr. Scott, his bookkeeper. Mr. Scott states, that he is positive there was no conversation between Mr. Joice and himself in June or July; that

there was only one conversation—the one that directed the note of September 18th, written some ten days subsequently.

I have no means of determining as between these two very respectable gentlemen, whose memory has proved treacherous. Intentional misstatement I cannot impute to either. If Mr. Cornwall had not denied so positively that any conversation occurred in June or July, and that any note was written in consequence, I should have surmised that Mr. Joice did not notify Mr. Cornwall as explicitly as he thinks he did, or intended to do; at all events, that Mr. Cornwall did not so understand him. But the conflict is not merely as to the purport of the conversation, but as to its occurrence. Mr. Joice is unable to produce the first note, but Captain Wright, the claimant, testifies, that in August Mr. Joice showed him a note stating that the boat was in debt two hundred dollars for coal. On the other hand, Mr. Cornwall and Mr. Scott are positive that no note of that kind could have been written “without its getting on the letter-book.”

Under these circumstances, I must endeavor to arrive at a decision, by attempting to estimate the probabilities of the case; and if these afford no reliable guide, and the testimony is found to be equally balanced and irreconcilably conflicting, I must determine against the side on which rests the affirmative of the issue or the burden of proof. It does not appear that the decision of this court in the case of *The Schooner Columbus*, 5 Saw. 487, was known to any of the parties. In that case it was held, that no lien exists under the boats and vessels act of this state in favor of a domestic material-man who has supplied a vessel in her home port at the request of the master, after having been notified by the owner that she had been let to the master to be run on shares, and to be manned and victualled by him, and that if supplies be furnished her, it must be exclusively on his personal credit. The point was new, and was in that case first presented to any court in this state. I am not aware whether the decision has met with general approval.

been known to the parties, and accepted as the

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law, the probability that they would have taken steps to bring themselves within it by notifying the supply-men of the terms of the charter, would be appreciably enhanced.

2. The boat had been long running on the waters of this state. Her owner was well known, and had had dealings with the libellant and the intervenors for a considerable period. To neither of the latter did he give any notice of his contract with the charterers, until at or near the expiration of the last charter. If he or his agent had intended to notify one of the persons with whom he had been dealing, why not extend the notice to all? It seems probable that he would have done so.

3. The owner does not appear to have thought that he had protected himself and his vessel from liability. When executing the last charter, August 18, 1880 (and it was while this charter was running that the greater part of the coal was furnished), he takes the guaranty of a third party, that the vessel shall be delivered free "from all liens accruing between June 14, 1880 (the date of the first charter), and the completion of the present charter." He seems therefore to have supposed, not only that liens might be created, but that they might already exist.

4. It seems improbable, that if Mr. Cornwall had received or understood the notice in question, he would have persisted in furnishing supplies on the credit of the vessel. In so doing, he would not only be running a great risk as to the payment by the boat or her owner, but would be committing a virtual fraud upon an old customer and acquaintance.

I am disposed to think that these considerations have sufficient weight to show to which side the trembling balance in which the testimony is to be weighed, should incline.

But if not, then the case must be decided by applying the rule that he on whom it rests to establish a certain state of facts, must do so by a preponderance of proofs. The rule is peculiarly applicable in this case. The supplies were furnished to the vessel for her use and on her credit. They were ordered by the master appointed by the owner. In such cases the law of this state confers a lien. He who

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would displace it by setting up a private agreement between himself and a third party, by which the master was deprived of the authority to create liens on the vessel, should show by clear proofs that explicit and unequivocal notice of the facts was given to persons dealing with the boat. And especially to those who had for a long time previously been in the habit of supplying her on her credit and that of her owners. It cannot be said that clear proofs of such a notice have been furnished in this case. It may be added that by this decision no practical injustice is done.

If the security taken by the owner is adequate, it is more equitable to compel him to look to it for his indemnity, than to deprive the supply-men of all remedy except a fruitless suit *in personam* against insolvent charterers.

A decree must be entered for the amounts claimed in the libels, with the deductions admitted at the hearing.

ANDREAS BRISWALTER v. GEORGE E. LONG.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

FEBRUARY 14, 1881.

1. BANKRUPTCY—SURVIVING PARTNER.—Where a surviving partner files his petition in bankruptcy, both individually and as surviving partner of a firm, the district court has authority, under the bankrupt act, to adjudge him bankrupt in both characters.

Before SAWYER, Circuit Judge.

THIS action was brought to recover certain property in the possession of defendant, as being property belonging to the late firm of Temple & Workman. The defendant claimed title as assignee in bankruptcy of Temple in his individual capacity, and also as surviving partner of the late firm of Temple & Workman. The facts showing his title as assignee were set up in the answer, in which it appeared that Temple filed a petition in bankruptcy in his individual capacity, and also in his capacity as surviving partner of Temple & Workman, praying to be adjudged bankrupt in

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both characters, which petition was granted by the court, and it was adjudged accordingly. The defendant was appointed assignee by the court. There was a demurrer to the answer, the only question being whether the court had power under the act to make the adjudication.

Smith, Glassell & Chapman, for plaintiff.

L. D. Latimer, for defendant.

SAWYER, Circuit Judge. This is a demurrer to the answer. There is a defect in the answer which ought to be corrected, I suppose a clerical error, describing the proceedings to have been in "this court," being the superior court of Los Angeles county, instead of in the district court of the United States for the district of California, as it should have been. With that correction, I think the answer is good.

The point is, whether the district court has authority under the bankrupt act to adjudge a person individually, and at the same time as surviving partner of a firm, to be a bankrupt. Undoubtedly, where the partnership is dissolved by the death of one of the partners, the surviving partner is entitled to wind up the partnership affairs. This is so at common law, and expressly so under the civil code. Nobody else could wind up the partnership affairs and collect the moneys due to the firm so well as he; therefore, the administration of the partnership assets is left in the hands of the surviving partner.

In this case Mr. Temple was adjudged a bankrupt on his own petition. He filed his petition both individually, and as surviving partner of the firm of Temple & Workman, and was adjudged a bankrupt in his individual capacity, and as surviving partner of that firm; the assignment was duly made of his individual property, and of the assets of the partnership, and the assets were afterwards administered in the court of bankruptcy. The question was raised in the district court by the plaintiff, that no authority could be found for Temple to be adjudged a bankrupt as a surviving partner. The court, however, held

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otherwise, and adjudged accordingly. I think the court had authority to make that adjudication. Otherwise, I do not see how the affairs of the firm could be wound up, for nobody else had authority in the matter but Mr. Temple, as surviving partner. It was his business to close up the affairs of the firm, and pay off the indebtedness so far as he could. But he became bankrupt as an individual, and as a member of the partnership, and the district court took charge of his affairs. After becoming bankrupt, he could no longer act in settling up the partnership affairs. If the district court could not settle his affairs as surviving partner, as well as his individual matters, nobody else could.

The administrator had nothing to do with the matter except to receive the share of the surplus, if any there should be, after settlement of the partnership affairs belonging to the deceased partner. The powers of the court in bankruptcy upon an adjudication of bankruptcy are, necessarily, called into action. The court, accordingly, takes charge of the partnership assets, settles up the matters, and applies the partnership funds, so far as is necessary, to the partnership debts, and the portion of the surplus, if any, belonging to Temple, goes to his personal assets, and are distributed to his individual creditors, and the portion of the surplus belonging to the estate of the deceased partner is paid over to his administrator. If Temple could no longer act in the settlement, then nobody else was empowered to take charge of it but the district court. The district court therefore had jurisdiction to adjudge Temple bankrupt as surviving partner, as well as in his individual capacity, and had power to take charge and control of the partnership property; and having adjudged him a bankrupt in due form, that judgment is valid. That being so, it disposes of the case, and the demurrer must be overruled, upon the technical amendment being made to which I have called attention.

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THE BARK CLEONE.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

MARCH 10, 1881.

1. SALVAGE—DERELICT COMPENSATION.—If a vessel, though with no one on board, under such circumstances that the persons assuming to be salvors knew or ought to have known that their services were not desired, and they take possession with intent to supplant the master and owners in giving her relief, they have no claim for compensation.
2. SAME—POSSESSION.—A stranded vessel, laden with a valuable cargo, was left, but not abandoned, by the master, having been placed in charge of an agent until he could return to recover his property: *Held*, that the wrecked vessel and her cargo could not be taken possession of by a stranger who was fully advised of these facts; and that the master was then on his way in another vessel to effect the salvage.
3. SAME—COMPENSATION.—*Held further*, that the mere fact of placing a man on board, with the object of anticipating and supplanting the master, would not entitle such stranger to a share of the property which was subsequently saved by the unaided efforts of the master.

Before HOFFMAN, District Judge.

George B. Merrill, proctor for libellants.*Milton Andros*, proctor for respondents and claimants.

HOFFMAN, J. On the fifteenth of October, 1879, the bark *Cleone*, which had just completed a successful whaling voyage in the Arctic ocean, came to anchor in St. Lawrence bay, near the northerly entrance to Behring strait. On the nineteenth her chains parted in a gale of wind, and a short time afterwards she was driven ashore on a sandy beach, in the north-east part of the harbor, where she bilged and filled with water. After the gale subsided she lay on her starboard side, "very still and quiet," in twelve feet of water. The season was far advanced, and Captain Nye, the master, at once set about transferring such portion of the cargo and outfit as was accessible, to the *Helen Mar*, which was then lying in the harbor. He put on board the latter vessel the whalebone he had obtained, provisions, articles of clothing, furniture, etc. He left on board the *Cleone* one hundred and fifteen barrels sperm oil, one thou-

Railway Company mortgage, four per centum—two thousand five hundred and eight dollars—of the amount, and by the Gaston mortgage, one thousand dollars; for the sum of twenty-seven thousand one hundred and thirty-four dollars, by the mortgage of the former and the latter, each one thousand dollars; and for the sum of four thousand and fifty-eight dollars, by the mortgage of the former two hundred dollars, in all the sum of five thousand seven hundred and eight dollars.

On January 8 and April 28, 1879, meetings of the directors of the defendant, the Dayton, Sheridan, and Grande Ronde Railway Company, were held, which are admitted to have been duly called and valid. At each of these, action was taken to sell and convey the property and franchise of said defendant, to the defendant, the Wallamet Valley Railway Company, upon the condition that the latter would pay the debts of the former, in which these mortgages were referred to, recognized, and approved.

This statement is substantially admitted by counsel for the defendants, but his contention and argument is, that an authority to the president and secretary of a corporation to make its note and mortgage for a specified sum does not include a contract to pay an attorney's fee, in case legal proceedings are taken to enforce the same. In this case, the vote of the directors only authorized the making of the mortgages for a specific sum, and is silent upon the subject of attorney's fees. But it is contended for the plaintiff that the subsequent recognition and approval of these mortgages must be taken and construed, as applying to every provision contained in them, as they were in fact executed, and not simply to the order in the records of the corporation directing the execution of a mortgage.

As to the question—did the direction to the president and secretary to make the mortgage of the corporation, to secure the payment of a specific sum, also authorize them to insert a contract therein, to pay an attorney's fee to the mortgagee in case the same was sued upon, my opinion is that it did not. They were the special agents of the corporation to do a particular thing—to execute a mortgage—and

if they exceeded this authority, their principal was not bound by it. (Story on Agency, secs. 17, 126.)

It is not claimed that there was any specific authority to insert this contract concerning an attorney's fee in the mortgage; nor is there anything in the nature of the act authorized or the evidence in the case, which tends to show that the insertion of such a contract was implied in the authority to make the mortgage, as being a necessary part of it, or that it was authorized by any general usage or established course of dealing between the parties, in reference to which it might be inferred that they acted in the execution and acceptance of the mortgage. No authorities have been cited upon the point, and I rest the decision of it upon the application of general principles to the particular circumstances.

But it is contended on behalf of the plaintiff that the ratification of these mortgages must be taken and construed as extending to every provision contained in them, as they were in fact executed, and not simply to the order directing their execution. Which of these constructions should be given to this ratification depends upon the evidence, the burden of proof being on the plaintiff, and the rule of the law, "that the ratification of an act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts." (*Owings v. Hull*, 9 Pet. 629.)

It may be admitted that the president and secretary—two of the directors—knew of this provision in the mortgages, but they were not the corporation, nor their knowledge that of the other directors. It should appear that the directors had such knowledge collectively, as a body, but it does not even appear that any of them knew of this contract save the president and secretary.

The directors may be presumed to know what was in their own records, but there was not in them even a suggestion that these instruments contained anything not absolutely necessary to a mortgage. But there is no presumption that the directors had seen these mortgages on the records of the county wherein they were recorded or elsewhere; nor does the fact of such record impart to them, as

directors, or to the corporation, so far as this question is concerned, even constructive notice of their contents.

The reasonable conclusion to be drawn from the evidence is, that the directors referring to and approving of the mortgages, on January 8 and April 28, 1880, theretofore given to the plaintiff, had reference to and approved of only such acts as it appeared from their records that a majority of their body had assumed the right to direct their president and secretary to do and perform.

It follows that the ratification of these mortgages did not include the special provision for an attorney's fee. The fact of its existence does not appear to have been known to the directors at the time of the ratification, and therefore it was not within their contemplation.

The contracts inserted in the mortgages of the corporation by the president and secretary being unauthorized and unratified cannot be enforced against it.

Objection is also made to the enforcement of the contract for an attorney's fee in the mortgages made by Gaston, but upon what ground does not appear. The matter needs only to be stated to show the futility of the objection. Gaston made two mortgages to secure the payment of his promissory notes to the plaintiff for the sums of sixty-two thousand seven hundred and twenty-four dollars and fifty-six cents and twenty-seven thousand one hundred and thirty-four dollars respectively, and expressly agreed therein, that if legal proceedings were taken to enforce the same, that by way of indemnifying the plaintiff against the costs and expenses thereof, it should be entitled to recover against him, in addition to the debt, an attorney's fee of one thousand dollars in each case. This was a lawful contract, lawfully made. (*The Wilson Sewing Machine Co. v. Moreno et al.*, 6 Saw. 35; *Bank of British North America v. Ellis et al.*, 6 Saw. 96.) The contingency has arisen. The mortgagor failed to pay his debt, and the mortgagee has been put to the expense of enforcing his claim by litigation, and is entitled to recover, as against Gaston, and enforce his mortgages, for the sum of two thousand dollars.

There must be a decree reciting the fact of the payment

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of the principal and interest due the plaintiff, as above stated, and the payment of costs up to that time, and dismissing the bill as to all the defendants except Gaston; and that the plaintiff recover of him said sum of two thousand dollars, and costs and expenses to be taxed, and for a sale of the mortgaged premises by the master of this court if the decree is not satisfied within ten days from the entry thereof.

THE STEAMBOAT S. M. WHIPPLE.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

FEBRUARY 11, 1881.

1. LIEN FOR SUPPLIES.—Where a steamboat was chartered under an agreement that the hirers should pay all expenses for supplies, etc., and redeliver her at the expiration of the charter, free of all liens, and supplies were furnished, for which, by the laws of this state, a lien upon her was created: *Held*, that the vessel was liable unless her owner could show by a clear preponderance of proof that notice of the terms of the charter was given to the supply-men.

Before HOFFMAN, District Judge.

Milton Andros, proctor for appellant.

G. M. Williams, proctor for claimant.

G. D. Hall and W. W. Morrow, proctors for several intervenors.

HOFFMAN, J. It is not denied that the supplies were furnished and the repairs made as set forth in the libel of the libellant and those of the intervenors.

At the time these debts were contracted, the vessel was under charter to G. A. Carleton and J. C. Spencer. By the terms of the charter Carleton & Spencer agreed to pay "all bills for wages, coal, supplies, and wharfage, accruing against the steamer during the period of the charter, and also all liens that may have accrued against said vessel since June 14, 1880" (they having had possession thereof since that date under a previous charter); "and further, that they would surrender and deliver the possession of the vessel

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prove successful. He and Ravens had, he testifies, numerous conversations on the subject. He cannot recollect whether he told Ravens about the letter. "I suppose he was shown it, just the same as I was." In this supposition I am inclined to agree with him. But it is inconceivable that in their long conversations on the subject, Dexter should have failed to communicate to Ravens the substance of the letter that had been shown him, and the fact that Nye was on his way. If Nye's testimony as to Ravens' statement of his owner's orders be true, the point is beyond dispute. For those orders distinctly contemplate his getting to the bay "ahead of Captain Nye."

Dexter's version of these orders, as stated to him by Ravens, though Captain Nye's name is not mentioned, evidently contemplates the same contingency. "Ravens told me that Merrill had instructed him that if he got to St. Lawrence bay *and had a chance*, to take charge of the vessel." Captain Nye testifies that the fact that he had taken command of the *Mount Wollaston* with the intention of effecting the salvage of the cargo of the *Cleone*, was well known, he thinks, to every shipmaster and officer at this port employed in the northern whaling and trading business. And he states that he communicated his intentions to Mr. Coffin, an acquaintance of fifteen years' standing, and who was then chief clerk to Mr. Merrill—a statement which Mr. Coffin has not been called to contradict.

On the whole, the evidence, in my judgment, leads unmistakably to the conclusion that Captain Ravens went into St. Lawrence bay with the expectation of there finding the *Cleone*; that he knew she had been left in charge of a native chief by Captain Nye, and that the latter intended to return to her to recover his property, and was then on his way thither. That when he put a man on board of her, it was not with a view of then entering on a salvage service. This was obviously impracticable, as the ice prevented him from getting nearer to her with his own vessel than eight miles. His design was to take possession of the vessel and to secure some sort of lien or right to take her cargo to the

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exclusion of her owner, at a future time, and whenever circumstances and his own convenience might permit.

The presence of Fagin on board contributed in no degree to the security of the vessel and her cargo. During the eight months that she had lain there, the depredations of the natives had been insignificant, and even these were by Indians from the interior, and not by those to whose chief the charge of the vessel had been intrusted. The sealing and fishing season had arrived, and the Indians were no longer in want of food, and the oil in the hold imbedded in ice six or eight feet thick, was practically inaccessible to them. To obtain it, Captain Nye was obliged to have recourse to dynamite. It thus appears not only that no part of the property was saved by Captain Ravens, but that nothing was done by him which contributed appreciably to its safety, or enabled Captain Nye to effect the subsequent salvage.

It is true that Fagin nailed a strip of lead on a cask to stop a leak. This could not have been of much service, as the oil was frozen to the consistency of lard, and Captain Nye offered to pay Fagin for his time, and also to make some compensation to Captain Ravens. But these offers were peremptorily rejected by Ravens, who demanded one half of all the property saved by Captain Nye, or at least of the oil.

The claim of the libellant to a salvage compensation is thus found not to be based on the performance of any salvage service of appreciable value, but on the fact that the *Timandra* succeeded in reaching St. Lawrence bay in advance of the *Mount Wollaston*, and that her master took, or attempted to take, possession of the *Cleone*, with a view of securing the property at a later period in the season. This claim I think is wholly inadmissible. The *Cleone* was not derelict. Her master had neither abandoned the *spes recuperandi*, nor renounced the *animus revertendi*. On the contrary, his correspondence shows that it was not merely his intention, but his fixed and unalterable determination to recover his property at the earliest practicable moment, and to the carrying out of this determination, all other engage-

ments and employments were subordinated. He not only had not abandoned the *spes recuperandi*, but he felt the utmost confidence in the success of the enterprise, persistently urging upon the owners that the certainty of recovering the oil was far greater than that of procuring a similar amount of oil by the catch of an ordinary whaling voyage in the Arctic ocean, while the risk was far less. Nor was the design of returning to the vessel formed after arriving at San Francisco. At the time of quitting the vessel, he adopted every means in his power to retain the constructive possession of her, and to notify all comers that she was in charge of a person selected by him, and that he intended to return and recover his property at the opening of the next season.

Under these circumstances it is impossible to treat the vessel as derelict. As well might the goods or "trade," as they are called, which it appears to be not unusual for vessels to leave, in charge of natives, at "stations" in the Arctic ocean, to await their return in the ensuing season, be pronounced derelict and liable to seizure by the first comer. (*Tyson v. Prior*, 1 Gall. 133; *The Aquilla*, 1 C. Rob. 37-41; *The Bee*, 1 Ware, 336; *The Cosmopolitan*, 6 Notes Cases (supplement), 17; *The Barefoot*, 1 Eng. L. & Eq. 661; *The India*, 1 Wm. Rob. 409; *The Lovett Peacock*, 1 Lowell, 143.)

The vessel not being derelict, but, on the contrary, in charge of an agent appointed by the master, whose intention to return was known to Captain Ravens, the latter had no right to take or attempt to take possession of her. To entitle a party to salvage, not only must the service rendered be meritorious, but the possession taken must be lawful. (*Clarke v. The Brig Healey*, 4 Wash. C. C. 656; *The Barefoot*, 1 Eng. L. & Eq. 661.)

By quitting the vessel the master and owner does not lose his *jus disponendi* or right of property. If a vessel be found, though with no one on board, under such circumstances that the persons assuming to be salvors knew, or ought to have known, that their services were not desired, and they take possession with intent to supplant the master and owners, in

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giving her relief they have no claim for compensation. (*The Upnor*, 2 Hag. 3; *The Barefoot*, *ubi sup.*; *The India*, 1 W. Rob. 406; *The Amethyst*, Davies, 23.) See argument of counsel (the late Mr. J. Curtis) in *The Island City*, 1 Black, 126; *The Champion*, Br. & Lush. Adm. 69.

These authorities establish beyond controversy the principle so agreeable to justice and reason, that unless the vessel has been utterly abandoned, and is in contemplation of law a *derelict*, even *bona fide*, salvors have no right to the exclusive possession, and are bound to give up charge to the master on his appearing and claiming charge. See *The Champion*, *ubi sup.*

It is not to be tolerated that a stranded vessel with a valuable cargo may be taken possession of by a stranger who knows that she has been left, but not abandoned; that she has been put in charge of an agent of the master, and that the latter intends to return to her, and is actually on his way to her for that purpose; nor that the mere fact of placing a man on board with the object of anticipating and supplanting the master shall entitle him to a share of the property which is subsequently recovered by the unaided efforts of its owner.

The libel must be dismissed, with costs.

THE UNITED STATES v. WILLIAM WATKINDS.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH 11, 1881.

1. **INDICTMENT—KNOWINGLY.**—An indictment for voting without having a lawful right to vote, contrary to section 5511 of the Revised Statutes, should contain an allegation that the defendant “knowingly” so voted—even if the possession of such knowledge by him is a mere question of law.
2. **CONVICTION OF CRIME—FORFEITURE OF THE PRIVILEGE OF AN ELECTOR.** The constitution of the state of Oregon (art. 2, sec. 3) declares that “the privilege of an elector shall be forfeited by a conviction of any crime which is punishable by imprisonment in the penitentiary;” the defendant was indicted for an assault with a dangerous weapon, contrary to section 536 of the Oregon Criminal Code, which crime was thereby made punishable by fine or imprisonment in the jail or penitentiary, in the dis-

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cretion of the court, to which accusation he pleaded guilty, and was sentenced to pay a fine of two hundred dollars; afterwards, on June 7, 1880, the defendant voted for representative in congress at an election held in Madison precinct, Oregon: *Held*, 1. That the term "conviction," as used in the constitution of Oregon, *supra*, is used in its primary and ordinary sense, and signifies a proving or finding that the defendant is guilty, either by the verdict of a jury or his plea to that effect, and does not include the sentence which follows thereon; 2. That a crime "is punishable" by imprisonment in the penitentiary, when by any law it may be so punished, and the fact that it also may be, or is otherwise punished, does not change its grade or character in this respect; 3. That the defendant was convicted by his plea of guilty of a crime punishable by imprisonment in the penitentiary, and thereby forfeited his privilege as an elector under the constitution of Oregon; and, 4. That assuming the term conviction to include the sentence, still the defendant was convicted of a crime so punishable—the liability to such punishment, and not the punishment actually inflicted, being the circumstance which controls the effect of the conviction in this respect.

3. PARDON.—*Semble*, that such forfeited privilege may be restored by a pardon to that effect, granted in pursuance of a statute expressly authorizing it.

Before DEADY, District Judge.

Rufus Mallory, for the United States.

H. Y. Thompson, George H. Durham, Sidney Dell, and W. W. Page, for defendant.

R. S. Strahan also filed a brief for defendant.

DEADY, J. On December 17, 1880, the defendant was indicted by the grand jury of the district court for the district of Oregon, for the violation of section 5511 of the Revised Statutes, committed by voting on June 7, 1880, for a representative in congress, at an election for such representative, in Madison precinct, county of Multnomah, state of Oregon, without having a lawful right to do so; for that, on June 28, 1871, he was indicted by the grand jury of the circuit court for the county of Marion, state of Oregon, of the crime of an assault with a dangerous weapon, committed upon the person of Samuel A. Clarke, by shooting at him with a pistol; of which crime he was, on June 30th thereafter, duly convicted, by his plea of guilty to said indictment, and sentenced to pay a fine of two hundred dollars and the cost of prosecution.

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The indictment was afterwards transferred to this court, and the defendant comes and demurs thereto, because: 1. It does not allege that the defendant voted as charged, knowing he had no right to vote; and, 2. Upon the facts stated therein the defendant was not disqualified to vote as charged.

The section (5511) under which the indictment is found declares, that "if, at any election for representative or delegate in congress, any person knowingly personates and votes, or attempts to vote, in the name of any other person, whether living, or dead, or fictitious; or votes more than once at the same election for any candidate for the same office; or votes at a place where he may not be lawfully entitled to vote; or votes without having a lawful right to vote; * * * he shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three years, or by both, and shall pay the costs of the prosecution."

The defendant, in support of the first ground of his demurrer, contends that the word "knowingly" is understood and implied in each clause of this sentence, so that it must be construed, as if it read—"knowingly personates and votes, or attempts to vote, etc.; or knowingly votes more than once, etc.; or knowingly votes at a place, etc.; or knowingly votes without having a lawful right to vote." And I have no doubt that such is the true construction of it.

In *United States v. Anthony*, 11 Blatch. 200, which was an indictment upon the same statute for the same offense, it appears to have been so construed as a matter of course—the court, in speaking of the section under consideration, saying that the "act makes it an offense for any person knowingly to vote for such representative [a representative in congress] without having a lawful right to vote." And, as this case was well contested on the part of the defendant, and turned solely upon the question of her knowledge of her want of right, this reading of the statute must have passed without contention, as being too plain for argument.

In that case the defendant was qualified to vote, except for her sex; the law of the state (New York) being, that none but males should vote. The defendant voted, claim-

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ing that under the fourteenth amendment to the constitution of the United States she was entitled to vote, notwithstanding she was a female. It was held, Hunt, J., that as the defendant knew all the facts and was presumed to know the law, her belief that she had a right to vote when she had none, was no defense to the indictment, and therefore the court directed the jury to find the defendant guilty, which was done. The belief in such case may affect the sentence, but not the verdict. (Whar. Cr. L., sec. 1835.)

But the true reading of the statute being, that the defendant's knowledge of the want of right to vote is an essential part of the crime, it should be expressly alleged in the indictment. (Bish. Stat. Cr., sec. 827 *et seq.*; Whar. Cr. P. & P., sec. 164.)

The demurrer upon this point is sustained. But as another grand jury may correct the indictment in this particular, or the defendant may be prosecuted by information (R. S., sec. 1022; *United States v. Block*, 4 Saw. 211), it is necessary, for the purpose of determining whether he ought to be held to answer, further to pass upon the second cause of demurrer.

The solution of the question made upon this cause of demurrer lies within a small compass, and depends primarily upon the signification of the term "conviction" and the phrase "is punishable," as used in section 3 of article 2 of the constitution of the state. The article is devoted to the subject of "suffrage and elections."

The first section only declares, in a somewhat oracular manner, without practical definition or limitation—"All elections shall be free and equal." The second one confers the right to vote upon all persons who are entitled under any circumstances to exercise that privilege within this state; and the third limits the second, by declaring who shall not be entitled to such privilege, and also by what means the privilege conferred by said section 2 may be lost. It reads: "No idiot or insane person shall be entitled to the privilege of an elector; and the privilege of an elector shall be forfeited, by a conviction of any crime which is punishable by imprisonment in the penitentiary."

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The argument in support of the demurrer is to the effect that "conviction" of a crime takes place by the operation or effect of the sentence or judgment of the court, determining and imposing the punishment therefor, and that as the defendant was only sentenced to pay a fine of two hundred dollars, he was therefore not convicted in the state court of a crime punishable by imprisonment in the penitentiary.

The authority cited and mainly relied upon to support this argument, is *People v. Cornell*, 16 Cal. 187. The case is briefly and obscurely reported. It contains a short opinion by Cope and Baldwin, JJ., each—Field, J., dissenting—and relates to an appeal taken by a defendant from a judgment upon his plea of guilty.

The authority of the case will be better understood by the following statement of it. The defendant was indicted for an assault with intent to commit murder, and pleaded guilty to an assault with a deadly weapon with intent to commit bodily injury, and was sentenced to pay a fine of one thousand two hundred dollars or be imprisoned in the county jail. The crime of which the defendant was convicted by his plea of guilty was punishable by imprisonment in the penitentiary or by fine or both; and by the law of the state any crime "punishable by death or imprisonment in a state prison" was a felony. (Hittell's Laws, secs. 1452, 1592.) By the constitution of the state, article 6, section 4 (Hittell's Laws, 35), it was provided that the supreme court of the state should have appellate jurisdiction "in all criminal cases amounting to a felony."

Counsel for the state moved to dismiss the appeal, and the motion turned upon the decision of the question, whether the defendant's right to an appeal depended upon the nature of the crime charged in the indictment or confessed by his plea of guilty, or the punishment imposed upon him by the sentence of the court. The court held that the defendant having been sentenced as for a misdemeanor, an appeal would not lie from such judgment because its appellate jurisdiction was limited to a "case amounting to felony." The court considered the case on

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the appeal as one of misdemeanor, and therefore not within its appellate jurisdiction.

It is true that in the opinions of the judges the terms conviction and judgment are used indiscriminately, and the punishment inflicted is spoken of as determining the grade of the offense. But these expressions must be taken and considered with reference to the question before the court, which was, whether a judgment, as for a misdemeanor, was a case of felony within the meaning of that clause in the constitution, giving it appellate jurisdiction "in all criminal cases amounting to felony;" and the answer was in the negative, because so far as the defendant was concerned the right to an appeal depended upon the nature of the result as to him, and not the charge.

In the same way, section 22 of the judiciary act (1 Stat. 84; Rev. Stats., sec. 691), giving the supreme court appellate jurisdiction over the judgments of the circuit courts in actions where "the matter in dispute" exceeds in value a certain sum, has been construed, so that, upon the appeal of the defendant, the value of the matter in dispute is measured by the amount of the judgment against him, while in the case of the plaintiff it is measured by the amount of the claim or charge. (*Gordon v. Ogden*, 3 Pet. 33; *Knapp v. Banks*, 2 How. 73; *Ryan v. Bindley*, 1 Wall. 66; *Walker v. United States*, 4 Id. 163.)

In *People v. War*, 20 Cal. 117, the question of the right of appeal in criminal cases came up again, and the court held (p. 120) that the statute definition of a felony—a public offense punishable by death or imprisonment in a state prison—included any offense which may be or is liable to such punishment, and that although the offense charged in an indictment may, in the discretion of the court, be punishable simply by a fine, still it is a felony, and an appeal will lie by the people from a judgment sustaining a demurrer thereto. In noticing *People v. Cornell*, the court said the jurisdiction of the appeal was denied in that case upon the ground that "the nature and extent of the punishment fixed the right of the appeal," by the defendant.

In *People v. Apgar*, 35 Cal. 389, the defendant was in-

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dicted for an assault amounting to a felony, and convicted and sentenced for a simple assault. He appealed, upon the ground that the character of the offense charged gave jurisdiction, but the appeal was dismissed upon the ground that he was acquitted of the felony and convicted of a misdemeanor only, and that therefore the case on appeal did not amount to a felony. And in referring to *People v. Cornell*, the court said, it was held therein, that the judgment determined the character of the case for the purpose of an appeal.

The effect of the decision, then, in *People v. Cornell*, as I understand it, and as interpreted in both the case of *War and Apgar*, goes no farther than that, unless the judgment in a criminal case imposed the punishment prescribed for a felony, the defendant cannot have the benefit of an appeal from it.

But the question in this case, is not whether the defendant has been convicted of a felony or misdemeanor, but whether he has been "convicted" of a crime "which is punishable by imprisonment in the penitentiary." And the fact that a subsequent statute (Or. Crim. Code, sec. 3) has declared a crime "which is or may be punishable by imprisonment in the penitentiary," to be a felony, does not have any bearing upon the case, unless it is to show, that in the legislative mind, the liability to such punishment fixes the grade of the offence and not the punishment actually inflicted.

In the argument for the defendant it has been assumed that "conviction" of a crime includes and is the result of the judgment or sentence of the court imposing the punishment prescribed therefor. But this is altogether a mistake. The term conviction, as its composition (*convinco, convictio*) sufficiently indicates, signifies the act of convicting or overcoming one, and in criminal procedure, the overthrow of the defendant by the establishment of his guilt according to some known legal mode. These modes are: 1. By the plea of guilty; and 2. By the verdict of a jury. Speaking of the difference between conviction and attain, Lord Coke says: "The difference between a man attainted and convicted is, that a man is said convict before he hath judg-

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ment; as if a man be convict by confession, verdict, or recreancy." To the same effect is the definition in Blount's Law Dic., anno 1670, *verbum* Convict.

Blackstone (4 Bl. 362) says: "If the jury find him [the defendant] guilty, he is then said to be convicted of the crime whereof he stands indicted. Which conviction may accrue two ways: either by his confessing the offense and pleading guilty; or by his being found so by the verdict of his country." Again, he says: "After trial and conviction, the judgment of the court usually follows." (Id. 364.) "We are now to consider the next stage of criminal prosecution, after trial and conviction are past * * *; which is that of judgment" (Id. 375), and "the plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be, * * * is a good plea in bar to an indictment." (Id. 336.)

Bishop (Statutory Crimes, sec. 348) says: "The word conviction ordinarily signifies the finding of the jury, by verdict, that the prisoner is guilty. When it is said, there has been a conviction, or one is convict, the meaning usually is, not that sentence has been pronounced, but only that the verdict has been returned. So a plea of guilty by the defendant constitutes a conviction of him."

Mr. Justice Story, in *United States v. Gibert*, 2 Sumn. 40, while considering the maxim—no man is to be brought into jeopardy of his life more than once for the same offense—said: "Conviction does not mean the judgment passed upon the verdict;" and in the same case held that a plea of *autrefois convict*—a former conviction—will be sustained by a confession or verdict, even when there has been no judgment, citing 2 Hawk. P. C., c. 36, sec. 1, 10.

In *People v. Goldstein*, 32 Cal. 432, it was held that a plea of guilty, upon which no judgment was given, was nevertheless a conviction, and would therefore sustain a plea of former conviction to an indictment for the same offense. And the very statute under which the defendant was indicted uses the term in the same sense. It provides that any person "upon conviction" of the crime therein defined, shall be punished as the court, within certain limits, may thereafter direct or adjudge by its sentence or judgment.

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But while this is the primary and usual meaning of the term conviction, it is possible that it may be used in such a connection and under such circumstances, as to have a secondary or unusual meaning, which would include the final judgment of the court. (Bish. Stat. Cr., sec. 348; Whart. Cr. P. & P., sec. 935.) Yet in *Stevens v. People*, 1 Hill, 261, it was held sufficient in an indictment for a second larceny to allege a prior conviction of the defendant without averring that there was any judgment or sentence pronounced against him; but the contrary appears to have been held in *Smith v. Commonwealth*, 14 Serg. & R. 69, cited in Whart. C. P. & P., *supra*.

But there is nothing in the subject or the language of the clause of the constitution under consideration, to indicate that the term "conviction" is used therein in any other than the ordinary sense. Of course, it is used there and elsewhere, with the understanding that the conviction was not afterwards set aside or annulled by the court. And this is probably the point of the ruling cited from 14 Serg. & R., *supra*—that the indictment, in alleging a prior conviction of the defendant, should allege a judgment on the verdict, not as constituting the conviction, but as conclusive evidence that it had not been set aside and was still in force.

It follows, then, that the defendant having pleaded guilty to an indictment charging him with an assault with a dangerous weapon, he was thereby convicted of such crime—proven guilty thereof.

It only remains to consider whether this crime was punishable by imprisonment in the penitentiary or not. As has been stated, the punishment prescribed by the statute defining the offense, is either a fine, imprisonment in the jail, or in the penitentiary, in the discretion of the court.

For the defendant, it is contended, that it was not punishable in the penitentiary, simple because it was not actually so punished; and section 764 of the Oregon criminal code, is relied upon as in some way supporting this position.

Now this section is simply declaratory of the pre-existing power of the court, and only requires it to determine the

punishment applicable to a particular case, when that is left by the statute undetermined between certain limits or kinds. But it does not authorize the court to impose a punishment in any case, which the law has not otherwise prescribed for the commission of the offense. Under the code, a crime is punishable—may be punished—by any punishment which the court is authorized to impose. It is punished by the punishment actually imposed, but it is *punishable* by any punishment that the law authorizes the court to impose. The phrase “is punishable,” cannot be construed to mean more or less than—may be punished, or liable to be punished.

In *People v. Van Steenberg*, 1 Park. C. R. 39, it was held, that a crime which, in the discretion of the court, might be punished by a fine or imprisonment in the jail or penitentiary, was a felony within the statute definition thereof, to wit, “an offense for which the offender, on conviction, shall be liable by law to be punished by death or imprisonment in the state prison.”

In *People v. Park*, 41 N. Y. 21, it was held, that a person sentenced, upon a conviction of a burglary punishable generally by imprisonment in the penitentiary, was sentenced upon a conviction for a felony within the meaning of the above definition, although, being under sixteen years of age, he was, in pursuance of a special statute, sentenced to a house of refuge for juvenile delinquents, instead of the penitentiary, and therefore that he was within the purview of the statute prohibiting persons from testifying as witnesses who had been “sentenced upon a conviction for felony.” To the same effect is *Andrew v. Dieterich*, 14 Wend. 34; *Peabody v. Fenton*, 5 Barb. Ch. 462; *Fassel v. Smith*, 23 N. Y. 255.

Indeed, the proposition that a crime which may be punished by imprisonment in the penitentiary—a crime which is liable to such punishment—is made punishable thereby, is so self-evident that it hardly admits of argument.

The conviction of the defendant of an assault with a dangerous weapon, was had by and upon his plea of guilty to the indictment charging him therewith. Thenceforth he

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stood convicted of a crime punishable by imprisonment in the penitentiary, and the liability to such punishment, and not the punishment actually inflicted, is the circumstance which controls the effect of the conviction in this respect. And the subsequent action of the court, in giving judgment upon such conviction, could not change the nature or effect thereof.

By virtue of section 3 of article 2 of the constitution, as a consequence of this conviction the defendant then and thereby forfeited the privilege of an elector, and thereafter had no lawful right to vote at any election in Oregon.

And even if it were conceded that the term "conviction" is used in the constitution in the sense of or so as to include the sentence of the court, still the conclusion would be the same. It would nevertheless be true, that the defendant was convicted of and sentenced for a crime which was then punishable by law by imprisonment in the penitentiary. The fact that he was otherwise punished for it, is entirely immaterial, because the forfeiture of his privilege as an elector did not depend upon the kind or measure of punishment actually inflicted, but the kind that might have been—the kind that the defendant was liable to, and the court was authorized to impose.

So much for the legal aspect of the case. A word as to the moral one. Throughout the argument for the defendant, the court has been pressed with the suggestion and assumption that this prosecution is in some way an injustice to him, and that it is a great hardship for an elector to forfeit his privilege for the conviction of a crime, which was only punished by the imposition of a comparatively small fine. In answer to the suggestion of injustice, it is sufficient to say that the prosecution is lawful. It is conducted by the attorney of the United States upon the authority of a grand jury of more than sixteen electors and taxpayers, impartially selected and drawn from the body of the district, for the alleged violation of one of its most important laws—the law to preserve the purity and integrity of the election of representatives in congress. Neither is there any hardship in the case that can enter into the present consideration of it.

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For reasons of public policy, the constitution of the state conferred the privilege of an elector on the defendant, during good behavior, and for like reasons declared it forfeited—withdrawn—upon his conviction of a crime of such character as presumptively proved him no longer fit for its exercise.

Nor is this presumption affected by the fact that the court before which the defendant was tried saw proper, in the exercise of that discretion confided to it, to impose a comparatively slight punishment upon him. Under the constitution the conviction of a crime, for which the offender is liable to imprisonment in the penitentiary, works a forfeiture of the privilege of an elector, irrespective of the kind or measure of punishment which the judge under the circumstances—personal, social, political, or otherwise—may see proper to impose as a punishment for it.

The law gave, and the law hath taken away—subject, it may be, to the operation of a pardon expressly restoring the privilege and granted in pursuance of an act of the legislature authorizing it.

The demurrer to the indictment is sustained on the first ground; but as it also appears, that the defendant voted as charged in the indictment without having a lawful right to do so, the case is continued to await the action of another grand jury or for prosecution by information, as the district attorney shall determine.

JUPITER MINING COMPANY v. BODIE CON. MINING COMPANY.*

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MARCH 12, 1881.

1. LENGTH AND WIDTH OF LODE CLAIMS.—The act of congress of May 10, 1872, authorizes a claim to be located one thousand five hundred feet in length along the vein, and in the absence of any local rule or custom, the width of such claim may extend three hundred feet on each side of the middle of the vein; but said act of congress, by implication, author-

* This is the case referred to in the note 6 Saw. 302, the case not having been reached in that volume.

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izes the miners to limit the width of such claims to twenty-five feet on each side of the middle of the vein.

2. **MINERS' RULES MUST BE IN FORCE.**—To be of any validity, a rule or custom of miners must not only be established or enacted, but must be in force at the time and place of the location. It ceases to be operative whenever it falls into disuse, or is generally disregarded.
3. **MUST NOT CONFLICT.**—The rules and customs of miners must not conflict with the laws of the United States, or the laws of the state in which the claims are located.
4. **STILL IN FORCE.**—Section 748 of the code of civil procedure of California is still in force, except so far as it is limited by act of congress; and no distinction is made by this provision of the state statute between a custom or usage proved by parol evidence, and a rule adopted by a miners' meeting and recorded in writing.
5. **QUESTION OF FACT.**—Whether or not a mining law or custom is in force at any given time, is a question of fact; but when shown to have been in force, the presumption is that it continues in force until the contrary is proved.
6. **VOID FOR EXCESS OF WIDTH.**—Where a location, otherwise valid, exceeds the width allowed by law, it is void as to the excess, but valid as to the extent allowed by law.
7. **DISCOVERY OF A VEIN.**—No rights can be acquired, under the statute, by location, before the discovery of a vein or lode within the limits of the claim located.
8. **DEFINITION OF VEIN OR LODGE.**—A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It may be very thin, or many feet thick, or irregular in thickness; and it may be rich or poor, provided it contains any of the metals named in the statute. But it must be more than detached pieces of quartz, or mere bunches of quartz not in place.
9. **DISCOVERY OF VEIN AFTER LOCATION.**—A location is made valid by the discovery of a vein or lode at any time after the location, provided, that such discovery is made before any rights are acquired in the same claim by other persons.
10. **FIRST DISCOVERER.**—It is not necessary that the locator should be the first discoverer of the vein; but it must be known and claimed by him, in order to give validity to his location.
11. **OTHER VEINS THAN THOSE DISCOVERED.**—Where a valid location is made upon a vein or lode discovered, the locator is not only entitled to the vein discovered, but to every other vein and lode throughout its entire depth, the top or apex of which lies within the surface lines of the claim extended vertically downwards, to which no right had attached in favor of other parties at the time the location became valid, although such veins or lodes may so far depart from a perpendicular as to extend outside of the vertical side lines.
12. **HOW LOCATION TO BE MARKED.**—A location of a mining claim must be distinctly marked on the ground so that its boundaries can be readily

- traced; but the law does not define, or prescribe, what kind of marks shall be made; or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed, by stakes, mounds, and written notices, whereby the *boundaries* can be readily traced, is sufficient.
13. **RIGHT OF SUBSEQUENT LOCATOR TO OBJECT.**—A subsequent locator has no right to object that the first location was not sufficiently marked on the ground at the time of the location, or before recording, provided that such first location was sufficiently marked on the ground before any valid subsequent location of the same claim.
 14. **OBLITERATION OF MARKS.**—After a location has been lawfully made, the right of the locator cannot be divested by the mere obliteration of the marks or removal of the stakes without his fault, he having performed the other acts required by the statute.
 15. **AS TO RECORD.**—The law of congress requires no record of a mining claim except in obedience to valid local rules or customs of miners; but when such local rules or customs require a record, it must contain the names of the locators, the date of the location, and such a description of the claim by reference to some natural object or permanent monument, as will identify the claim; but such natural objects or permanent monuments are not required to be on the ground located, although they may be; and the natural object may consist of any fixed natural object; and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground. If, by reference to any such natural object or permanent monument, the claim recorded can be identified with reasonable certainty, the record will be sufficient in this particular, otherwise not.
 16. **OBJECT AND EFFECT OF RECORD.**—The object of recording mining claims is to give notice to others desiring to locate in the vicinity. The language of the act of congress authorizing miners to make regulations "governing the location and manner of recording," implies that the act of location is distinct from that of recording, except where the regulations of miners make recording necessary to constitute a location; so that, a location may be complete and vest the exclusive right of possession before any record thereof is made, unless recording is made an act of location, or one of the acts necessary to constitute a location, by miners' rules or regulations.
 17. **FORFEITURE BY FAILURE TO RECORD.**—The right to a mining claim will not be forfeited by a failure to record the same, in the absence of a miners' rule or regulation providing for a forfeiture on that ground.
 18. **EFFECT OF ACTUAL NOTICE.**—In the absence of any miners' rule or regulation making recording a necessary act or condition of a complete location, or providing for a forfeiture by failure to record, a prior location of a mining claim, without recording the same, gives the locator thereof the exclusive right to possess and enjoy the same as against all persons having actual notice of such location and the extent thereof.
 19. **WORK NECESSARY TO HOLD A CLAIM.**—The statute requires one hundred dollars' worth of work on each claim located after May 10, 1872, in each year, and in default thereof, authorizes the claim to be relocated by other

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parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year, and before any relocation is made, he thereby preserves his claim; the statute nowhere authorizes a trespass upon, or a relocation of a claim before located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim.

20. WORK TO HOLD ADJOINING CLAIMS.—Where one person or company owns several contiguous claims capable of being advantageously worked together, one general system may be adopted to work such claims; and work done according to such system for the purpose of prospecting or working all such contiguous claims, although done on only one of such claims, or even outside of all of them, is available to hold all such contiguous claims intended to be worked or prospect~~ed~~ by such general system.

Before SAWYER, Circuit Judge.

THIS was an action in the nature of an action of trespass upon a lode mining claim in the Bodie mining district, California, in which the defendant pleaded title to the *locus in quo*. The case was removed from the state court to the circuit court of the United States, where it was tried by a jury.

Garber, Thornton & Bishop, and Robert M. Clark, for plaintiff.

Stewart, Van Clief & Herrin, and P. Reddy, for defendant.

SAWYER, Circuit Judge. Gentlemen of the Jury: * * * First in the order of proceedings you will naturally consider the questions that arise on the plaintiff's title. I do not understand the defendant to insist that the plaintiff has not made out a *prima facie* title to the ground covered by its claims, now known as the Jupiter Company's ground, embracing the four claims—the Savage, the East Savage, the Riordan, and the Daley. It does claim, however, by its own evidence, to overthrow that title, by showing a title in itself prior and superior to that title. *Prima facie* I do not understand the defendant to claim that plaintiff has not shown its title to these claims, but the question that arises on its title, is, is the point on the Actæon vein where the acts complained of were committed, within the claims

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of the plaintiff? Does the plaintiff own the lead at the point where the acts complained of were performed? If it does not, then it has no title to the vein worked upon, and it is not injured by the act of the defendant, and your verdict must be for the defendant, whether the defendant has shown title to the vein in question or not. Unless the plaintiff has title to that vein, it cannot recover in this action. That point, therefore, is an important one for you to determine, and it is the first question in logical order that arises in this case.

It will be convenient for you to dispose of this first; I will, therefore, first call your attention to it. If you find that point against the plaintiff, it will be unnecessary for you to go further. In order that the plaintiff should be the owner of the Actæon vein, it must be one of the veins or ledges which was located in one of plaintiff's four claims, or it must have its top or apex within the side lines of some one of its claims, drawn vertically downwards.

The first question then is, is it one of the ledges which plaintiff's grantors located? The point where the acts complained of were performed is here (pointing on the model), from this point downwards in what has been termed—and the name may be used to designate the place here—the Actæon ledge. The plaintiff insists on two positions, first, that it is the lode which its grantors located in the Savage, and which claim was located on this lode here, which, plaintiff's counsel says, according to the strike of the lode, runs somewhere in this direction. The plaintiff does not locate it on, or claim that it was any other lode than that, I believe. Then, is it identical with the lode, which was located in the Savage claim? Now, this is known to have been exposed, and is seen only in these two places. That fact, in connection with the other facts in relation to the formation of the country rock around here, and the other surrounding facts, is the fact from which you must determine that question—whether it is, or is not, that lode. It is insisted on the part of the defendant that this is a mere spur, or offshoot of the Fortuna lode. If it is not such a

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spur or offshoot, then, it insists that it is an independent lode wholly disconnected from any of the other lodes.

Now, gentlemen, if that is only an offshoot or spur of the Fortuna lode in such a way as to be simply part of that lode, then the plaintiff has no title to it, and it claims none. It disclaims any title to the Fortuna lode.

It is for you to determine from the testimony whether it is part of the Fortuna lode; or whether it is an independent lode; or if it is a part of the Savage lode. If it is a part of that lode in the Savage which plaintiff located, then, if the plaintiff has title to the Savage, it has title to that vein. If it has not title to the Savage, it has not a title to the lode through the Savage, or if it is not a part of that lode, then plaintiff has no title to it on that ground.

The next question is, if it is not a part of that lode, then has it its top or apex within the side lines of any one of the plaintiff's claims drawn vertically downwards? Because, if it has, and plaintiff has a valid title to that claim, then it is plaintiff's property. If it has not its apex within the side lines of any of plaintiff's claims drawn vertically downwards, and is not one of the lodes which the plaintiff actually located, then it has no title to it.

Those are the questions of fact for you to determine on this branch of the case. You have heard the testimony, and the comments of counsel on it, and upon the testimony you must determine the questions. It is insisted by the defendant, if this vein is not a spur or offshoot of the Fortuna lode, that, then, it is an independent lode; and the plaintiff insists, if it is an independent lode, that it has its top or apex within one of its claims; and the defendant insists that the top or apex is outside of the plaintiff's claims.

If it is an independent lode, the question is, in what direction on the dip does it run, and where is its apex or top? Mr. Anderson and Mr. Whiting testified that at this point here, with a mathematical instrument made and used for that purpose, they measured the angles of the dip, and according to their measurement and their testimony, the dip would carry it some distance outside of the Daley claim, supposing it to run in that direction to the surface. If it

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is an independent lode, and has its top or apex outside of the Daley claim, then it does not belong to the plaintiff. If it is inside of the Daley, if it has its top or apex inside of the Daley or Savage, it does belong to the plaintiff, if they have the better title to those claims.

Professor Jenny and Mr. Holmes, on the contrary, testified that they put a plumb-line on the vein, although they do not profess to have measured the angle, and they say it is nearly perpendicular; and, supposing it to go in that direction to the surface, it would come very near to the Daley line, and a little inside. Where the top or apex is, is for you to determine. The plaintiff claims that, owing to the formation of the country rock, the probability is, that the vein runs to this point, and then turns off and runs into the Savage. The plaintiff's theory, as I understand the testimony, is, that here are two different formations. This formation to the eastward is a secondary formation; this to the westward is the primary (pointing to the map). That the line of stratification runs in different directions in the two formations there. That is claimed to be secondary (pointing). If you believe that theory as to the formation of the rock here, and believe that the lodes found outside or to the eastward of this blue clay stratum, run in this direction, and the stratification there in the same direction dipping to the west, and the leads and stratification to the westward, in this direction, dipping to the east, then it will be a question of probabilities for you to determine whether or not this Actæon lode passes up and crosses over the blue clay stratum into the other formation, thence following its line of stratification to the surface, or is it more likely to have pursued its course in its own formation, following the line of its stratification, as this Fortuna vein has apparently done here on the same side of the stratum of blue clay. This Fortuna vein, it would seem, follows its own formation and line of stratification throughout. You are entitled to consider the probability—if these are different formations, as they say—the probability whether the Actæon vein would run in that direction and pass out here into another formation, or whether it would be confined to the formation in

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which it is found and to which it properly belongs. I can give you no further aid on that question. You must take the testimony as you find it, and view it with a candid and impartial spirit, and give such determination to the question as you think all the facts and circumstances in the case justify. If, then, the Actæon vein is not one of the lodes located by plaintiff; if it has not its top or apex within the side lines of any one of the claims of plaintiff drawn vertically downwards, then it is not the plaintiff's lode, and you will have to find for the defendant, whether the defendant owns it or not. If you find for the defendant on that proposition, that disposes of the case, and there is no necessity to spend any further time on the other points of the case. If you find for the plaintiff, however, on that issue, that the Actæon is the lode that the plaintiff has located there in the Savage, or has its top or apex within the side lines of any one of the claims that the plaintiff owns drawn vertically downward, it will be necessary for you to consider the defendant's title—whether the defendant has an anterior and a superior title; otherwise it will not be necessary to look at its title. I will say with reference to this branch of the case, that the plaintiff alleges this to be its lode. It devolves upon plaintiff, therefore, to show affirmatively to you that it is entitled to that lode. The burden of proof is on the plaintiff. If it fails to show it, or if the testimony is equally balanced, then you must find for the defendant, because plaintiff must show by a preponderance of testimony that the lode is within its claim. If it fails on that, your verdict must be for the defendant.

If you find for the plaintiff on that point, as I said before, it will be necessary to consider the defendant's title. I will say, with reference to the defendant, as I said with reference to the plaintiff, when you come to the defendant's title the burden of proof is on the defendant. It devolves on it in the same way by preponderance of evidence to show that its title is anterior and superior to that of the plaintiff.

Now, gentlemen, in order that you may know whether the defendant has a title or not, it will be necessary for you

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to be informed what it is necessary to do in order to secure a title to a mining claim.

By an act of congress which took effect May 10, 1872, all valuable mineral deposits in lands belonging to the United States were declared to be free and open to exploration and purchase, under regulations prescribed by law and according to the local customs or rules of miners in the several districts, so far as applicable and not inconsistent with the laws of the United States.

The location under which defendant especially claims was made since May 10, 1872, and at the time it was made the statute of the United States authorized a claim to be one thousand five hundred feet in length along the vein or lode, and it was provided that no claim "shall extend more than three hundred feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface."

In the absence, then, of any mining rule or custom *in force* at the time of the location at the place where it is made, the location may extend to the distance of three hundred feet on each side of the middle of the vein at the surface; that is to say, the claim may be one thousand five hundred feet in length along the vein by six hundred feet wide, including three hundred feet on each side of the middle of the vein.

As I construe the statute, however, and so instruct you, by implication, the miners, by a rule, regulation, or custom established and in force at the time and place of the location, may limit the width of the claim to twenty-five feet on each side of the middle of the vein at the surface. But such limitation to twenty-five feet on each side, to be valid, must be by virtue of a rule, regulation, or custom which has not only been established, but which is actually in force at the time of the location.

The regulation must be in accordance, and not in conflict, with the laws of the United States, and of the state of California; and the laws of California provide that "in actions respecting mining claims proof must be admitted of the

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customs, usages, or regulations, established and *in force* at the bar or diggings embracing such claim, and such customs, usages, or regulations, when not in conflict with the laws of this state, must govern the decision of the action." This provision is still in force except so far as its operation is limited by the act of congress.

The Lucky Jack location, under which defendant claims, was made May 26, 1875, and the claim was located three hundred feet wide on each side of the lode in pursuance of the act of congress allowing such location.

It is claimed by the plaintiff that there was at the time of the location, a regulation in force in that district, limiting the claim to fifty feet on each side of the vein, and that the location of three hundred feet is therefore void. Now, whether there was or not such a regulation or custom *in force* at the time is a question of fact to be found by the jury from all of the evidence in the case on that point.

The plaintiff, to show a regulation limiting the location to fifty feet on each side, introduced the minutes of proceedings of a miners' meeting in the district, held July 10, 1860, in which there is a rule making such limitation, and minutes of meetings held at various subsequent times, amending the rules, but continuing this rule in force, down to and including November 13, 1867, at which time the last action in respect to modifying the rules and regulations was had, till December 30, 1876, which is a year and seven months after said location, and nine years after any meeting amending said rules.

The defendant, to meet this testimony, introduced in evidence the mining records of the district, from which it appears that no miners' meeting was held, and no mining recorder was elected from July 3, 1869, till October 9, 1875—more than six years—and that from and including the year 1872, when the act of congress referred to took effect, and thenceforth down to the year 1875, only one quartz location was made in the district; there being none after the passage of the act of congress in 1872; one in 1873, in which no width was specified, and none in the year 1874; that during the year 1875 eleven quartz locations were made, of

which nine were made three hundred feet on each side of the lode, and purported to have been made in pursuance of said act of congress, and two only of fifty feet wide on each side, one of which two was marked on the record as abandoned, and during the year 1876 twenty-five locations appear to have been made, of which five were six hundred feet wide; one an extension of a six hundred feet claim having no width mentioned, and the others fifty feet wide on each side. From this it is argued by the defendant that quartz mining in the district, so far as new locations are concerned, was practically abandoned for several years, and no laws on the subject of new locations were practically in force; that on the return of the miners, and the revival of mining in 1875, the act of congress had been passed, and the miners regarded that act as superseding the old laws on this point, and as authorizing the location of quartz claims three hundred feet wide on each side, and in practice adopted, and generally acquiesced in that rule during the year 1875, and partially in 1876, till the meeting in December of that year—the rule limiting the claims to fifty feet by common consent falling into disuse and ceasing to be in force.

As held by the supreme court of California, in commenting upon the provision of the state statute cited, which is still in force: "No distinction is made by the state statute between a custom or usage, the proof of which must rest in parol, and a regulation which may be adopted by a miners' meeting, and embodied in a written local law. This law does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of the miners following the enactment. It is void whenever it falls into disuse, or is generally disregarded. It must not only be established, but *in force*."

"A custom reasonable in itself and generally observed will prevail as against a written mining law which has fallen into disuse. It is a question of fact for the jury whether the mining law is in force at any given time."

It is for you, then, gentlemen of the jury, to determine whether this limitation to fifty feet was actually in force at

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the time the location of the Lucky Jack, three hundred feet wide on each side, was made. The fact that the rule in question was adopted and kept on foot in the laws for a considerable period of time would be *prima facie* evidence, nothing to the contrary appearing, that it was in force at one time, and being once in force, a presumption would arise that it continued in force till something appears tending to show that it had been repealed, or had fallen into disuse, and another practice been generally adopted and acquiesced in. The mere violation of a rule by a few persons only, would not abrogate it if still generally observed. The disregard and disuse must become so extensive as to show that in practice it has become generally disused. Now, gentlemen, whether in view of there being few locations in this district during several years, and none in some, and of the passage of the act of congress referred to, and the location at first, after the revival of the mining interest in 1875, of most all claims, in pursuance of the provisions of the act, three hundred feet wide on each side, if such be the fact, and in view of all the circumstances appearing in the evidence, it is for you to determine whether the fifty feet limitation had fallen into disuse, or was really *in force* at the time of the location in question. If it was *not* in force, then, in that particular, if otherwise valid, the location was good and valid to the full extent of three hundred feet on each side of the vein. If the limitation was in force, then it was void as to the excess over fifty feet on each side of the vein, but valid to the extent of fifty feet and no more.

The statute also provides, gentlemen of the jury, that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." So that no rights can be acquired under the statute by a location made before the discovery of a vein or lode within the limits of the claim located. A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or with some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It is not enough to discover

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detached pieces of quartz, or mere bunches of quartz not in place.

The vein, however, may be very thin, and it may be many feet thick, or thin in places—almost or quite pinched out, in miner's phrase—and in other places widening out into extensive bodies of ore. So also in places it may be quite or nearly barren, and at other places immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location, including the vein or lode. It may, and often does, require much time and labor and great expense to develop a vein or lode after discovery and location, sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary before incurring such expense in developing the vein to secure to the miner the fruits of his labor and expense in case a rich mine should be developed. If, then, the locators of the Lucky Jack discovered such a mineral vein or lode as I have described, however small, before the location of that claim, the location of the claim embracing within its lines the vein or lode so discovered, was in this particular valid—otherwise not. The same observation would be true as to each of the other claims held by the plaintiff or defendant.

The defendant claims that its grantor discovered such a vein or lode as I have described in Lucky Jack, shaft No. 1. You have heard the testimony on the point, and it is for you to determine whether they did or not. If they did, then the location is good in that respect—otherwise it is not.

It is not necessary that the locator should be the first discoverer of the vein, but it must be known to him and claimed by him in order to give validity to the location. I instruct you further that if a party should make a location in all other respects regular, and in accordance with the laws and the rules, regulations, and customs in force at the place at the time upon a supposed vein before discovering the true vein or lode, and should do sufficient work to hold

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the claim, and after such location should discover the vein or lode within the limits of the claim located, before any other party had acquired any rights therein, from the date of his discovery, his claim would be good to the limits of his claim, and the location valid.

The defendant also claims that its grantors discovered veins in shaft No. 2 and its drifts and cross-cuts, long before plaintiff acquired any rights in the ground. If so, the claim is good in that particular. Similar discoveries are claimed to have been made by its grantors in the Warren Loose shaft, drift, winze, etc.

So also, gentlemen of the jury, where a party has made a location upon a mineral vein or lode discovered by him in all respects valid, he is entitled to "have the exclusive right of possession and enjoyment of all the surface included within the lines of his location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downwards vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical lines of such surface location."

That is to say, if the defendant, or its grantors, discovered a mineral vein or lode in the Lucky Jack claim, and made and has now in all respects a valid location of that claim, then it is not only entitled to the particular vein or lode so discovered and located in said claim, but to all other minerals, veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of its surface lines extended vertically downwards, to which no right had attached in favor of other parties, at the time its location became valid, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines of the surface location. If the defendant has a valid claim to six hundred feet wide, then its right extends to all such veins or lodes, under the conditions stated, so within the surface lines bounding the six hundred feet drawn vertically downwards; and if the Actæon vein in question is one of

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of the plaintiff? Does the plaintiff own the lead at the point where the acts complained of were performed? If it does not, then it has no title to the vein worked upon, and it is not injured by the act of the defendant, and your verdict must be for the defendant, whether the defendant has shown title to the vein in question or not. Unless the plaintiff has title to that vein, it cannot recover in this action. That point, therefore, is an important one for you to determine, and it is the first question in logical order that arises in this case.

It will be convenient for you to dispose of this first; I will, therefore, first call your attention to it. If you find that point against the plaintiff, it will be unnecessary for you to go further. In order that the plaintiff should be the owner of the Actæon vein, it must be one of the veins or ledges which was located in one of plaintiff's four claims, or it must have its top or apex within the side lines of some one of its claims, drawn vertically downwards.

The first question then is, is it one of the ledges which plaintiff's grantors located? The point where the acts complained of were performed is here (pointing on the model), from this point downwards in what has been termed—and the name may be used to designate the place here—the Actæon ledge. The plaintiff insists on two positions, first, that it is the lode which its grantors located in the Savage, and which claim was located on this lode here, which, plaintiff's counsel says, according to the strike of the lode, runs somewhere in this direction. The plaintiff does not locate it on, or claim that it was any other lode than that, I believe. Then, is it identical with the lode, which was located in the Savage claim? Now, this is known to have been exposed, and is seen only in these two places. That fact, in connection with the other facts in relation to the formation of the country rock around here, and the other surrounding facts, is the fact from which you must determine that question—whether it is, or is not, that lode. It is insisted on the part of the defendant that this is a mere spur, or offshoot of the Fortuna lode. If it is not such a

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spur or offshoot, then, it insists that it is an independent lode wholly disconnected from any of the other lodes.

Now, gentlemen, if that is only an offshoot or spur of the Fortuna lode in such a way as to be simply part of that lode, then the plaintiff has no title to it, and it claims none. It disclaims any title to the Fortuna lode.

It is for you to determine from the testimony whether it is part of the Fortuna lode; or whether it is an independent lode; or if it is a part of the Savage lode. If it is a part of that lode in the Savage which plaintiff located, then, if the plaintiff has title to the Savage, it has title to that vein. If it has not title to the Savage, it has not a title to the lode through the Savage, or if it is not a part of that lode, then plaintiff has no title to it on that ground.

The next question is, if it is not a part of that lode, then has it its top or apex within the side lines of any one of the plaintiff's claims drawn vertically downwards? Because, if it has, and plaintiff has a valid title to that claim, then it is plaintiff's property. If it has not its apex within the side lines of any of plaintiff's claims drawn vertically downwards, and is not one of the lodes which the plaintiff actually located, then it has no title to it.

Those are the questions of fact for you to determine on this branch of the case. You have heard the testimony, and the comments of counsel on it, and upon the testimony you must determine the questions. It is insisted by the defendant, if this vein is not a spur or offshoot of the Fortuna lode, that, then, it is an independent lode; and the plaintiff insists, if it is an independent lode, that it has its top or apex within one of its claims; and the defendant insists that the top or apex is outside of the plaintiff's claims.

If it is an independent lode, the question is, in what direction on the dip does it run, and where is its apex or top? Mr. Anderson and Mr. Whiting testified that at this point here, with a mathematical instrument made and used for that purpose, they measured the angles of the dip, and according to their measurement and their testimony, the dip would carry it some distance outside of the Daley claim, supposing it to run in that direction to the surface. If it

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made, the custom in force at the time required; whether the custom was in all particulars sufficiently known and recognized to make it binding upon the miners; and whether the location of the Lucky Jack claim substantially conformed to it. In determining these questions, the fact, if it be a fact, that there was an uncertainty as to where a record should be made—some recording in the district records, some in the county recorder's office, and many in both; the fact that there was no recorder elected for six years; that Bechtel, the last deputy, and the man who seems to have actually done the recording, resided during a portion of the time out of the district, coming, in some instances, at the request of parties, from his residence, into the district to record claims; and the fact that miners, at their first meeting in October, 1875, after several years' *hiatus* in their meetings, deemed it necessary, or at least prudent, to ratify and validate, by resolution, the records of the preceding five or six years, are all circumstances that the jury are entitled to consider, as tending to show that there was no custom as to the place where the record should be made, prevailing during that period, sufficiently certain, well known, and defined, and generally recognized and acquiesced in, to be of any binding force.

The jury are entitled to give these circumstances such weight, in connection with all the other evidence bearing upon the question, as they deem them entitled to receive. And it is for you to determine whether, under the circumstances, a record in the county recorder's office was sufficient.

If a record was required then, in order to make a valid record, it was necessary for it to contain the name or names of the locator or locators; the date of the location, and such a description of the claim or claims located, by reference to some natural or permanent monument, as would identify the claim.

The natural objects or permanent monuments here referred to, are not required to be on the ground located, although they may be; and the natural object may consist of any fixed natural object; and such permanent monument

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may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground.

The exact effect of a record, or want of a record, I have not before had occasion to consider. The law of congress authorized miners to make regulations "governing the location and manner of recording * * * mining claims." This language implies that the act of location is distinct and different from the act of recording, except in districts where the regulations of the miners make the recording an act of location, or one of the acts necessary to constitute a location. But in the Bodie mining district, there is no evidence of a miners' regulation or rule which makes recording an act of location, or necessary to a valid location. The location is always referred to in the rules in evidence as distinct from and preceding the record, so that a location of a mining claim in that district, at any time in the year 1875, may have been complete or perfect before any record thereof was made.

Independent of the question of forfeiture, therefore, it follows under the written rules in evidence that by an otherwise valid location of a mining claim in the Bodie mining district, at any time in 1875 a person may have acquired the exclusive right of possession and enjoyment of such claim, at least as against other parties having actual notice of the claim, its position and extent, before recording such location.

Assuming the proposition that the miners have authority to make a regulation or law by which a mining claim may be forfeited by failure to record the location thereof, yet such regulation or law, in order to effect a forfeiture, must provide that such failure to record shall work a forfeiture of the claim. In the language of the supreme court of California: "The failure of a party to comply with a mining rule or regulation cannot work a forfeiture unless the rule itself so provides. There may be rules and regulations which do not provide that a failure to comply with their provisions shall work a forfeiture; if so, a failure will not work a forfeiture." (*Bell v. Bed Rock Tunnel Co.*, 36 Cal. 219.) "The failure to comply with any one of the mining

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of the plaintiff? Does the plaintiff own the lead at the point where the acts complained of were performed? If it does not, then it has no title to the vein worked upon, and it is not injured by the act of the defendant, and your verdict must be for the defendant, whether the defendant has shown title to the vein in question or not. Unless the plaintiff has title to that vein, it cannot recover in this action. That point, therefore, is an important one for you to determine, and it is the first question in logical order that arises in this case.

It will be convenient for you to dispose of this first; I will, therefore, first call your attention to it. If you find that point against the plaintiff, it will be unnecessary for you to go further. In order that the plaintiff should be the owner of the Actæon vein, it must be one of the veins or ledges which was located in one of plaintiff's four claims, or it must have its top or apex within the side lines of some one of its claims, drawn vertically downwards.

The first question then is, is it one of the ledges which plaintiff's grantors located? The point where the acts complained of were performed is here (pointing on the model), from this point downwards in what has been termed—and the name may be used to designate the place here—the Actæon ledge. The plaintiff insists on two positions, first, that it is the lode which its grantors located in the Savage, and which claim was located on this lode here, which, plaintiff's counsel says, according to the strike of the lode, runs somewhere in this direction. The plaintiff does not locate it on, or claim that it was any other lode than that, I believe. Then, is it identical with the lode, which was located in the Savage claim? Now, this is known to have been exposed, and is seen only in these two places. That fact, in connection with the other facts in relation to the formation of the country rock around here, and the other surrounding facts, is the fact from which you must determine that question—whether it is, or is not, that lode. It is insisted on the part of the defendant that this is a mere spur, or offshoot of the Fortuna lode. If it is not such a

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spur or offshoot, then, it insists that it is an independent lode wholly disconnected from any of the other lodes.

Now, gentlemen, if that is only an offshoot or spur of the Fortuna lode in such a way as to be simply part of that lode, then the plaintiff has no title to it, and it claims none. It disclaims any title to the Fortuna lode.

It is for you to determine from the testimony whether it is part of the Fortuna lode; or whether it is an independent lode; or if it is a part of the Savage lode. If it is a part of that lode in the Savage which plaintiff located, then, if the plaintiff has title to the Savage, it has title to that vein. If it has not title to the Savage, it has not a title to the lode through the Savage, or if it is not a part of that lode, then plaintiff has no title to it on that ground.

The next question is, if it is not a part of that lode, then has it its top or apex within the side lines of any one of the plaintiff's claims drawn vertically downwards? Because, if it has, and plaintiff has a valid title to that claim, then it is plaintiff's property. If it has not its apex within the side lines of any of plaintiff's claims drawn vertically downwards, and is not one of the lodes which the plaintiff actually located, then it has no title to it.

Those are the questions of fact for you to determine on this branch of the case. You have heard the testimony, and the comments of counsel on it, and upon the testimony you must determine the questions. It is insisted by the defendant, if this vein is not a spur or offshoot of the Fortuna lode, that, then, it is an independent lode; and the plaintiff insists, if it is an independent lode, that it has its top or apex within one of its claims; and the defendant insists that the top or apex is outside of the plaintiff's claims.

If it is an independent lode, the question is, in what direction on the dip does it run, and where is its apex or top? Mr. Anderson and Mr. Whiting testified that at this point here, with a mathematical instrument made and used for that purpose, they measured the angles of the dip, and according to their measurement and their testimony, the dip would carry it some distance outside of the Daley claim, supposing it to run in that direction to the surface. If it

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Any work done by the Bodie company on the claim for that purpose, after the conveyance to it October 7, 1877, and before May 26, 1878, is available as work for the year from May 26, 1877, to May 26, 1878, to prevent a forfeiture. With regard to the work required to be done in order to hold a claim, the jury are further instructed, that where one person or company owns several contiguous or adjoining claims capable of being advantageously worked together, one general system may be adopted to work such claims. Such system may consist of a shaft with drifts, cross-cuts, and tunnels therefrom, and such works need not be upon any of the claims in question. When such system is adopted, work in furtherance of the system is work on the claims intended to be developed by it. Work done outside of the claims, or outside of any claim, if done for the purpose and as a means of prospecting or working the claim, is as available for holding the claim as if done within the boundaries of the claim itself.

To conclude, gentlemen of the jury, in view of the legal principles I have stated to you, if you find from the evidence that the so-called Actæon vein upon which the trespass is alleged to have been committed, is not one of the veins actually located in either the Savage, East Savage, Riordan, or Daley claims, and if its top or apex is not within the planes of the side-lines of either of said claims drawn vertically downwards, then it does not belong to the plaintiff, and your verdict must be for the defendant, whether it has title to the claim or not. The plaintiff cannot recover unless the vein belongs to it. So if the top or apex of said Actæon vein is within the planes of the side-lines drawn vertically downwards of any mining claim to which the defendant has shown a valid title prior in point of time to the title to any of the four claims relied on by plaintiff in like manner embracing said vein, whether such valid prior claim of defendant be six hundred or one hundred feet wide, the verdict must also be for the defendant.

But if, on the contrary, you find that the said Actæon vein, at the point where the trespass is alleged to have been committed, is the vein actually discovered and located by

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plaintiff's grantors, in any one of the said four claims of the plaintiff, or that it has its top or apex within the planes of the side-lines of any one of said four claims drawn vertically downwards, and if you further find that the defendant has not shown a title as against said plaintiff by a valid subsisting prior location embracing said top or apex within its side-lines drawn vertically downwards, then your verdict must be for the plaintiff.

Gentlemen, I believe the testimony is very indistinct as to the amount of damages. No testimony was offered as to the amount of damages. If you find for the plaintiff, and you have no testimony on which to estimate correctly the amount of damages sustained, you will find nominal damages, say one dollar. The form of the verdict will be, "We, the jury, find for the plaintiff, and assess the damages at so much." If you find for the defendant your verdict will be, "We, the jury, find for the defendant."

BING GEE, ADM'R OF AH KOW, v. AH JIM, SAID
BOCK, AND SAM BING.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH 18, 1881.

1. SURETIES IN AN UNDERTAKING FOR AN ATTACHMENT, LIABILITY OF.—The sureties in an undertaking for an attachment under the Oregon civil code (section 144), in case the plaintiff fails to obtain judgment in the action, are liable to the defendant for all the costs and disbursements that may be adjudged to him, whether the latter are made in the action or upon the attachment.
2. APPEAL, WHEN DOES NOT PREVENT SUIT ON UNDERTAKING.—An appeal which does not operate as a *supersedeas*, will not prevent the appellee from maintaining an action upon the appellant's undertaking for an attachment in the court below.

Before DEADY, District Judge.

John M. Gearin and C. B. Bellinger, for plaintiff.

John H. Woodward and Charles H. Woodward, for defendants.

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DEADY, J. This action was commenced in the circuit court for the county of Multnomah. The defendants appeared, and caused it to be removed to this court. It is brought upon the undertaking of the defendants for an attachment given in the action of *Ah Jim v. Ah Kow*, then pending in the circuit court for the county of Clatsop, in November, 1879.

The complaint alleges, that in pursuance of said undertaking and the affidavit of Ah Jim, a writ of attachment was issued in said action, upon which the property of Ah Kow was attached, at Astoria, consisting of five houses and a store, in which he was then engaged in business as a Chinese merchant, whereby he was put to great expense and trouble, and his credit as a merchant injured, to his damage two hundred and fourteen dollars; that on January 7, 1880, Ah Kow died, and the plaintiff herein, as the executor of his last will, was made defendant in said action, in which, on February 3, 1880, the defendant obtained a judgment against Ah Jim for the sum of one hundred and eighty-nine dollars and sixty-five cents, for costs and disbursements therein, and that execution thereon against the property of Ah Jim has been returned wholly unsatisfied; that in the defense of said action the plaintiff herein was put to expense in the employment of interpreters and attorneys, to his damage three hundred and seventy-five dollars; and that said action was malicious and without probable cause.

The allegations concerning the injury to the credit of the plaintiff's testator, and the expense incurred in the employment of attorneys, were, on motion of the defendants, stricken out of the complaint as immaterial. The defendants then pleaded in abatement of the action, that an appeal had been taken from the judgment of the Clatsop county court against Ah Jim for costs and disbursements, to the supreme court, which was still pending; which plea, on the motion of the plaintiff, was stricken out as immaterial, it not appearing therefrom that any undertaking had been given on such appeal, to stay the proceedings and the judgment. The defendants then answered, denying the allega-

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tions of the complaint, except as to the judgment for costs; and as to that, that it was for not more than one hundred and nine dollars and twenty-five cents, and the right of the plaintiff to sue as executor.

The cause was submitted to the court for trial without the intervention of a jury; and it found that the attachment was sued out and levied as alleged, and that it was wrongful; that the plaintiff's testator was injured thereby in the sum of seventy-five dollars; and also, that the plaintiff herein obtained judgment in said action against the defendant herein, Ah Jim, for his costs and disbursements, taxed at one hundred and forty-four dollars and twenty-five cents, and two dollars and forty-five cents accruing expense on the execution.

The defendants contend that as the attachment was only ancillary to the action, they are not liable at all for costs, and only for such expenses as were incurred on account of the attachment. On the contrary, the plaintiff insists that under the statute he is entitled to recover the costs and disbursements adjudged to him in the former action, whether on account of the action itself or the attachment therein. In support of his position, counsel for defendant cites *Norton v. Cammach*, 10 La. An. 10, in which it was held that a surety on a sequestration bond is only liable for such expenses as are incident to the sequestration and release; and *White v. Wyley*, 17 Ala. 167, cited in *Drake on Attachment* (sec. 176), to the same effect.

But the statutes under which these rulings were made are not given. I suppose they are similar to those in many of the states in which the liability of the obligors in a bond or undertaking for an attachment for both costs and damages depends alike upon the fact that they are the result of the attachment; and where that is merely ancillary, of course it does not include such as are simply the result of the action. But such is not the language of the statute of this state. Section 144 of the Oregon civil code provides that the plaintiff in an action, before procuring a writ of attachment to issue, shall give an undertaking, with one or more sureties, "to the effect that the plaintiff will pay all costs

that may be adjudged to the defendant, and all damages which he may sustain by reason of the attachment, if the same be wrongful and without sufficient cause, not exceeding the sum specified in the undertaking.”

“Costs,” as used in this section, only includes an allowance for attorney’s fees; but a party entitled to “costs” is also entitled to disbursements. (Or. Civil Code, secs. 538–543.)

No provision is made in the code for an allowance of costs upon an attachment as distinguished from the action in which the writ issues, nor can disbursements be allowed or recovered except by a party entitled to costs. Neither is there any provision authorizing the taxation and recovery of disbursements upon an attachment before or otherwise than upon the final judgment in the action, and therefore if the attachment should be discharged upon the application of the defendant, as being wrongful, as provided in section 159, and the plaintiff should also obtain judgment in the action, the defendant could not recover the expenses incurred on the attachment otherwise than by an action on the undertaking as a part of the damages sustained by reason of the attachment.

But when, as in this case, the plaintiff in the action fails to obtain judgment, and the attachment also fails and is *prima facie* wrongful, the defendant being entitled to judgment for costs and disbursements in the action, may include therein the disbursements made on account of the attachment, unless objection is made to the taxation, when the wrongfulness of the attachment may be controverted by the plaintiff, by showing that notwithstanding the failure to obtain judgment, there was good ground for issuing the attachment, and the court will pass upon the question and allow or disallow the taxation of these disbursements accordingly. (Drake on Attach., sec. 170.)

With this brief reference to the provisions of the code bearing on the subject and their operation, we will consider the effect of section 144, *supra*, as applied to this case. The supreme court of the state has not passed upon the

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question, and this court, for the present, must decide it for itself.

Counsel for the defendants contend that the parties to the undertaking are not bound to pay "all costs that may be adjudged to the defendant" in the action generally, but only such as are so adjudged by reason of the attachment, while the argument of the plaintiff is that the statute expressly gives the right to recover all costs adjudged, when the plaintiff fails in the action, thereby making the undertaking in such case a security for costs.

In my judgment the parties to the undertaking incur two distinct obligations: 1. To pay all costs and disbursements that may be adjudged to the defendant—not including all disbursements which he may incur by reason of the attachment or action, but only such as the court in which the action is tried shall determine he is entitled to; and, 2. To pay all damages that the defendant may sustain by reason of the attachment, if the same be wrongful, and this includes expenses incurred by reason of a wrongful attachment, even where the plaintiff prevails in the action.

Of course this conclusion makes the undertaking for an attachment a security for costs in the action where the plaintiff fails to obtain judgment therein, but it is not apparent why this result ought to prevent the court from giving the statute effect according to its language and probable purpose. Indeed, this provision may be considered as a wholesome restraint upon the proceedings by attachment in aid of a doubtful claim.

The New York code (sec. 230) provides that the undertaking for an attachment shall be to the effect "that if the defendant recover judgment, or the attachment be set aside by the order of the court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment." In other words, if the plaintiff fail in his action, the parties to the undertaking must pay the costs thereof. The statute of Tennessee is also similar in this particular to that of Oregon, but I have not found any decision under either it or the New York one on this question. It provides that the sure-

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ties shall satisfy "all costs which shall be awarded to the defendant, in case the plaintiff shall be cast in his suit, and also all damages which shall be recovered against the plaintiff * * * for wrongfully suing out the attachment." (Drake on Attach., sec. 170.)

The plaintiff in this action is entitled to recover the sum of one hundred and forty-six dollars and seventy cents, the costs and disbursements adjudged to him in the former action, and also the sum of seventy-five dollars, the damages sustained by his testator by reason of the attachment in said action—in all two hundred and twenty-one dollars and seventy cents—and there will be a finding accordingly.

The court then added: The parties to this action being all aliens, the court has not jurisdiction of the controversy, but as the objection was not made by counsel, it did not occur to the court until a conclusion was reached upon the merits. Counsel then said, the parties would abide the result, and that judgment might be entered upon the finding, which was done.

CITY OF PORTLAND v. OREGONIAN RAILWAY CO.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH 22, 1881.

1. CAUSE REMOVED—INJUNCTION.—Upon the removal of a cause from a state to a circuit court, the latter has power to modify or allow an injunction therein, before the first day of its next term.
2. INJUNCTION.—Where a suit for injunction turns wholly upon the validity of an act of the legislature granting the defendant the exclusive right to the use of certain property, to aid in the construction and operation of its railway, which is claimed by the plaintiff as a public levee or landing, and the use of such property in a way not materially in conflict with any use to which it is being put, is of great advantage to the defendant, an injunction restraining it from such use will be modified accordingly; and in the consideration of the matter, weight will be given to the presumption that an act of the legislature is valid and that the defendant is engaged in a public enterprise in which the public is interested.
3. BOND.—Upon the modification of an injunction, the court may require, as a condition of such modification, that the defendant give a bond to secure the plaintiff against any injury which may result to it from the same, or to perform the final decree concerning the same.

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Before DEADY, District Judge.

Julius C. Moreland, for plaintiff.*Ellis G. Hughes*, for defendant.

DEADY, J. At the last session (1880) of the legislative assembly, an act was passed granting the defendant—the Oregonian Railway Company, limited—among other things, the use of the triangular-shaped piece of ground lying between the east line of blocks 112 and 113 of the city of Portland, and the east bank of the Wallamet river, the same being, as appears from the map, about five hundred and twenty feet long and fifty feet wide at the south end, and three hundred feet at the north end, and known as the “Public Levee,” and dedicated to public use as a levee, by a map and ordinance of the plaintiff—the city of Portland—recorded March 6, 1869, “to be held, used, and enjoyed for occupation by track, sidetrack, water stations, depot buildings, wharves, and warehouses,” and such other “erections” as may be found necessary or convenient in the shipping and storing of freight under the exclusive control of the owners of the railway then being constructed by the defendant from Portland to the head of the Wallamet valley; with a proviso, that the defendant should not sell or assign the premises otherwise than as an appurtenance to said railway; and that said grant shall be forfeited if said railway is not completed to the said premises before January 1, 1882; saving to the plaintiff “any pecuniary or property rights” which it may have in said premises “as a municipal corporation, and which the state may not lawfully appropriate in this act.” In pursuance of this act the plaintiff entered upon the premises and commenced to prepare the ground for the uses specified in the act.

The plaintiff, claiming the act of the legislature to be in excess of its power, and therefore void, on January 31, 1881, commenced a suit in the state circuit court for this county, perpetually to enjoin the defendant from occupying or using the premises thereunder, and on the same day ob-

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tained an *ex parte* order for a temporary injunction, restraining the defendant as prayed for in the bill, which was served on February 2d, thereafter. Afterwards, on February 17th, the suit, on the petition of the defendant, was removed to this court and a transcript filed herein on February 25th.

On March 17th, the plaintiff filed a petition asking that the injunction heretofore granted be modified so as to allow it the use of the premises for a track and side-tracks to facilitate the construction of its road from Portland to the point where it will connect with the junction of the sections thereof already constructed between a point in Marion county and Brownsville, Linn county, on the east side of the Wallamet river, and Dayton, and Sheridan, and Dallas on the west side, stating that it is the owner of the east part of block 71, lying immediately north of said levee, and has a wharf thereon for the loading and unloading of sea-going vessels; that the iron for constructing said railway must be imported in such vessels, and that if allowed the use of the levee as aforesaid, in connection with said block 71 and wharf thereon, it can receive and forward said iron at a great saving of time and expense; that no use is now being made of said levee, and that a track can be laid across it without interfering with the use of it as a levee, and without materially affecting the surface of the ground.

On March 21st, the plaintiff showed cause against the application by the affidavit of its clerk, and the matter was argued by counsel.

There is no doubt of the power of the court to grant this petition at this stage of the proceedings. For although the cause is not for trial or hearing in this court until the first day of the next term—the second Monday in April—yet, it is in this court from the date of the removal, and such conservatory acts as the allowance or modification of an injunction may be had therein at any time thereafter. (*Mahoney Mining Co. v. Bennett*, 4 Saw. 289; *New Orleans City R. Co. v. Crescent City R. Co.*, 5 Fed. Rep. 160.)

The final determination of this case will turn upon the

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validity of the legislative act granting the use of the premises to the defendant.

The presumption is in favor of the validity of the act, and at this stage of the litigation this presumption ought to have weight. At least it will not do to assume that the act is invalid, but only that it may be so. There are no particular equities in the bill which the defendant must answer before it is entitled to a modification of this injunction. At best, it is only a suit to try the title of the defendant to property which is claimed to be subject to a public easement, and a preliminary injunction is only allowed to preserve the property for such use, in case it is determined that the defendant has no title thereto. Therefore the defendant ought not to be any further restrained, until the invalidity of its title is determined, than is necessary to preserve the property for the purpose to which the plaintiff claims it is devoted. The property is an unimproved piece of ground, of which no practical use has ever been made as a public levee or landing, and probably never will be until it is improved by the erection of wharves and warehouses thereon. The business of loading and unloading vessels is not done in this country upon open quays or mud banks. The use of the property for laying and operating a track and sidetrack thereon during the pendency of this suit, so as to enable the defendant to connect the construction of its road by rail with its wharf on block 71 aforesaid, and complete it in time to prevent a forfeiture of the grant, will work no possible harm to the plaintiff or public, and may be of much benefit to the defendant. For it seems that by the act the defendant must complete its road "to the said premises," or place "erections" thereon of the value of ten thousand dollars before January 1, 1882, or the grant is forfeited. On account of this injunction it cannot place the "erections" on the property, and unless it is modified as suggested it may not be able to comply with the other condition.

Indeed, there is but little reason for a preliminary injunction in this case at all. As has been said, the public is making no use of the property as a levee or otherwise, and

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cannot until it is improved. And, if the defendant was even permitted to go on and build a depot thereon, as well as a track and sidetracks, what harm would result to the plaintiff from it? If the final determination is against the defendant, it may be compelled to remove them (*C. S. U. Co. v. V. & G. H. W. Co.*, 1 Saw. 482), or what is more likely, the plaintiff may keep the improvements as a part of its property, and thereby gain what the other loses. Nor is there any suggestion, that the defendant is insolvent and unable to respond in damages for any injury it may cause to the property of the plaintiff. If this were a public levee or landing in fact as well as name, and the defendant was materially interfering with the public use of the premises by its proposed "erections" and "constructions," there would be ground for restraining it until its right to do so was finally determined. But as it is, there is no public use to be disturbed, and the actual controversy is confined to the right of the defendant to the exclusive use of the premises, and their use by it in the mean time, in such a way as to cause no injury thereto, and at least not to materially interfere with the public use, if any, ought not to be restrained.

Again, in the consideration of this question, it ought not to be forgotten that the speedy construction of the defendant's railway to a deep-water landing in this city, is a public enterprise in which the public is interested. As such, the legislature has undertaken to encourage and promote its completion at an early day. On this consideration, alone, a court will be careful in the exercise of the power of injunction before final decree, not needlessly or lightly to interfere with the progress of such an enterprise, or by delaying or impeding its construction for a season, deprive the community of the benefits that may be derived from it.

Besides, the court has authority, in the exercise of this power, to take security against any injury which the plaintiff may sustain by reason of the acts permitted to the defendant. (*N. P. R. Co. v. St. P., M. & M. Ry. Co.*, 4 Fed. Rep. 692.)

- Let the injunction be modified so as to permit the de-

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fendant to construct and operate a track and sidetracks over and upon the premises during the pendency of this suit; it first giving bond in the penal sum of five thousand dollars, with one or more sureties to be taken and approved by the master of this court, conditioned that it will, upon the order of this court, or upon the entry of a final decree in this suit against the right and claim of the defendant to the use of said premises under and by virtue of said legislative act, remove said track and sidetracks from said premises and leave the same in as good a condition for use as a public levee as they now are; or the defendant may deposit in the registry of this court United States bonds of the par value of five thousand dollars as a security for the performance of said acts.

Z. J. HATCH AND M. O. LOWNSDALE v. WALLAMET IRON BRIDGE CO.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH, 28, 1881.

1. JURISDICTION.—A suit arises out of a law of the United States when the controversy involved in it turns upon the proper construction or application of such law; and, therefore, a suit by the owner of a vessel authorized to engage in the coasting trade upon the Wallamet river, and by riparian owners thereon, to enjoin the erection of a bridge over said river at Portland, as being in violation of the act of congress under which said vessel was enrolled and licensed, and the act of congress (11 Stat. 383) declaring said river a free and common highway, arises under said laws, whether the plaintiffs are entitled to the relief sought or not.
2. NAVIGABLE WATERS—CONTROL OF.—The power of congress to regulate commerce (Con., art. I, sec. 8) includes, for the purposes of commerce, control of all the navigable waters of the United States which are accessible from a state, other than the one in which they lie; and for this purpose, they are the waters of the nation, and subject to the legislation of congress in every particular affecting their navigability or use as instruments or means of commerce.
3. BRIDGES—NAVIGABLE WATERS.—The state has the sole power to bridge the waters within its limits, but this power is subject to the power of congress to prevent obstructions to navigation being placed in such waters within the state and accessible from without it; and therefore, in the absence of legislation by congress to the contrary, a state may dam or otherwise obstruct the navigable waters within its limits at pleasure.

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4. CONGRESSIONAL ACTION—CONSTRUCTION OF.—The acts of congress authorizing a vessel to engage in the coasting trade within a state are construed as not manifesting an intention upon the part of congress to interfere with the power of the state to obstruct the navigable waters within its limits, but only to authorize their navigation by such vessel for the purposes of such trade, so long and far as they are navigable.
5. *IDEM.*—The provision in section 2 of the act of February 14, 1859 (11 Stat. 383), admitting Oregon into the Union, which declares that “all the navigable waters of said state shall be common highways and forever free” to all the citizens of the United States, is paramount to a law of the state authorizing a bridge to be erected across the Wallamet river; and therefore if such bridge, as proposed to be constructed, will materially impede or obstruct the free navigation of said river, it is unlawful, and the parties constructing it may be enjoined at the suit of the riparian owners injured thereby.
6. INJUNCTION GRANTED.—A preliminary injunction granted to restrain the building of a bridge over the Wallamet, with a draw of only one hundred feet on either side of the pivot-pier, under the authority of an act of the state legislature authorizing the building of such bridge, with a good and sufficient draw of not less than one hundred feet, upon evidence showing that such a bridge would materially obstruct the navigation of the river, because said act did not absolutely authorize a bridge with a draw of only one hundred feet, and if it did, it was in conflict with the act of congress of February 14, 1859, *supra*, declaring the river a free and common highway, and therefore it is void.

Before DEADY, District Judge.

Hugh T. Bingham, Edward Bingham, and E. C. Bronnaugh, for plaintiff.

H. Y. Thompson and George Durham, for defendant.

DEADY, J. On October 18, 1878, the legislature of Oregon passed an act authorizing the “Portland Bridge Company,” a corporation incorporated under the laws of Oregon, “or its assigns,” to build a bridge, “for all purposes of travel or commerce,” across the Wallamet river, between Portland and East Portland, “at such point or location on the banks of said river” as it might select, “on or above Morrison street of said city of Portland”—“provided, that there shall be placed and maintained in said bridge a good and sufficient draw of not less than one hundred feet in the clear in width of a passage-way, and so constructed and maintained as not to injuriously impede and obstruct the

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free navigation of said river, but so as to allow the easy and reasonable passage of vessels through said bridge.”

On July 16, 1880, the defendant—the Wallamet Iron Bridge Company, as the assignee of said Portland Bridge Company, commenced the erection of a bridge across the river from the foot of Morrison street, in Portland, to N street, in East Portland. At this point the river is about one thousand four hundred feet wide, at extreme low water, with a depth of not less than fifty feet, for two hundred feet from the Morrison-street wharf, along the line of the proposed bridge, whence it gradually shoals to twenty-three feet at a further distance of two hundred and fifty feet. The river rises in the winter months, from the rains, and in the spring is backed up by what is known as the June rise in the Columbia. The highest water is twenty-eight feet above low water, and during the past winter the rise was twenty-one feet and six tenths above low water.

The current in the ship channel along and immediately at the line of the proposed bridge is nearly parallel with the direction of the opening between the piers, and varies in velocity from one to seven miles an hour, and at average high water is from three to four miles an hour. During the winter months, strong southerly winds blow down the river for days at a time.

The abutment pier is to be placed at the bank in front of the Morrison-street wharf, and the spaces between the next five piers are as follows: The first, one hundred and eighty feet; second, a space on either side of the draw-pier of one hundred feet each, and then two spaces of two hundred feet each.

The piers are constructed by driving piles inside of wooden cribs, and filling the spaces between them with loose stone up to a little below low-water mark, and above with iron tubes filled with concrete, except the draw-pier, which is to be of masonry above low water. The spans are to be of wood, except the draw, which is to be of iron. The lower chord is to be eight feet above high water. The five piers east of the western abutment are now above low water.

On January 3d the plaintiffs filed their bill in this court to enjoin the defendant from constructing this bridge, on the ground that the same is, and will be, a serious and unlawful obstruction to the navigation of the river. Among other things, the bill alleges, that Lownsdale is the owner of an interest in wharves and warehouses on blocks 73 and 74 of Portland, on the west bank of said river—a distance of about six hundred feet above the location of said bridge, of the value of ten thousand dollars, and that the plaintiff, Hatch, is the lessee of the whole of said property for a term of years, at a rent of seven hundred dollars per month; that a large portion of the commerce of the Wallamet valley has been done through, and at said wharves and warehouses; that a large portion of the wheat raised in said valley has been received and stored there for shipment in sea-going vessels to foreign ports; that vessels carrying two thousand tons can navigate the channel on the west side of the river for a distance of a mile above Morrison street, and therefore that bank is now occupied by wharves and warehouses engaged in the commerce of the Wallamet valley and other portions of the coast and Europe; that the space allowed for a draw in said bridge is too narrow to admit the passage of vessels with safety, and therefore they cannot, and will not, come to complainants' wharves to discharge and receive cargo, to their great and permanent injury; that the plaintiff, Hatch, is the owner of an enrolled and licensed steamboat—the *A. A. McCully*—which is employed in towing vessels to and from the wharves aforesaid, upon the river aforesaid, and that the erection of said bridge with so narrow a draw-opening prevents the same from being done with safety, to his injury.

It appears from the affidavit of C. H. Gorril that he and his brother, R. W. Gorril, of California, are stockholders in the defendant corporation, and are engaged as contractors in the construction of the bridge; that they are to receive one hundred and fifty thousand dollars for the work, and are under bonds in the sum of twenty thousand dollars to complete the same by April 1, 1882; that they have expended on the work fifty thousand dollars, including the

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purchase and preparation of the timber and lumber for seven of the eight spans and all the iron for the same, and that if not restrained by this court they will complete the bridge by June 1st.

Section 1 of the act of March 3, 1875 (18 Stat. 470), which, among other things, gives this court jurisdiction of a suit in equity arising under a law of the United States includes this case.

Congress has power "to regulate commerce with foreign nations and among the several states" (Con., art. I, sec. 8); and this includes, for the purpose of commerce, the control of all the navigable waters of the United States, which are accessible from a state other than that in which they lie. For this purpose they are the waters of the nation, and subject to the legislation of congress in every particular affecting their navigability or use as instruments or means of commerce. (*Gibbons v. Ogden*, 9 Wheat. 1; *Pennsylvania v. W. & B. Bridge Co.*, 18 How. 431; *Gilman v. Philadelphia*, 3 Wall. 724.)

In pursuance of this power to regulate commerce, congress has provided (Title L, of the R. S.) that certain vessels, when enrolled and licensed as required by law, shall have the right to engage in the coasting trade—that is, the trade upon the navigable waters of the United States. The plaintiff, Hatch, is the owner of a vessel so enrolled and licensed for this district, and his contention is that this bridge will and does prevent the enjoyment of this right, and therefore this suit arises out of a law of congress, as applied to the facts and circumstances of the case.

Again, the act of congress, of February 14, 1859 (11 Stat. 383), admitting Oregon into the Union, provides (sec. 2), "that all the navigable waters of said state [Oregon] shall be common highways and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, toll, or impost therefor." Both the plaintiffs are riparian proprietors upon the stream over which this bridge is being built, and their contention is, that it does and will obstruct the navigation of the river so as to prevent its being used as a common highway, to

their injury as such proprietors, and therefore, this suit arises out of a law of congress as applied to the facts and circumstances of the case.

To sustain jurisdiction under this clause of the act of 1875, *supra*, it is not necessary to show or assume that the plaintiffs are entitled to the relief sought, but it is sufficient if the controversy turns upon or grows out of the proper construction or application of these acts of congress, or either of them.

The power to authorize the erection of a bridge over a navigable water of a state, for the convenience of the inhabitants thereof, belongs to the state as a part of its general police power. Congress does not possess this authority directly, *eo nomine*, but its control over the navigable waters of the states as a means of commerce, gives it a practical veto upon the power of the state in this respect. Therefore no state can authorize or maintain the erection of a bridge over a navigable water, which in effect contravenes or conflicts with a law of congress concerning the navigation of the same. And the fact that such water is wholly within the state is immaterial, if it is accessible from another state or forms a part of a navigable way between itself and other states.

If then, this bridge, in its construction or effect, is in conflict with either of these acts of congress, it is so far unlawful, and if injurious in its operation to the rights of the plaintiffs, is a nuisance, and may be prevented or abated. But if it does not contravene such law, then, however it may inconvenience or obstruct the navigation of the river, this court cannot interfere. The power of congress to regulate the navigation of the river does not execute itself; nor can this court enforce it until congress has declared its will on the subject. Until then, the power is dormant, and the authority of the state is sufficient to justify any structure or obstruction that may be placed therein.

In this case, the defendant insists that it is building this bridge in pursuance of a law of the state, and that there is no law of congress upon the subject, to the contrary, and therefore it is lawful.

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Does the law under which Hatch's steamboat is authorized to engage in the coasting trade conflict with the act of the legislature authorizing this bridge? Upon the authorities I do not think it does. The supreme court seems to have been careful not to declare a conflict between state and federal legislation on this subject upon mere implication. And the reason of this is apparent. Congress can at any time declare specifically what shall be a lawful bridge, and what shall not; and as it belongs more properly to the political than the judicial power to determine such questions, the courts will not assume that a bridge is an unlawful obstruction, because it incidentally conflicts with or limits some right, or privilege, claimed or existing under an act of congress.

A license to engage in the coasting trade means something. As was said by Mr. Justice Swayne, in *Gilman v. Philadelphia*, *supra*, it "carries with it right and authority. 'Commerce among the states' does not stop at a state line. Coming from abroad it penetrates wherever it can find navigable waters reaching from without into the interior, and may follow them up as far as navigation is practicable." And in *Gibbons v. Ogden*, *supra*, it was held that a law of the state of New York, giving certain persons the exclusive right to navigate the waters of that state by vessels propelled by steam or fire, as against such license, was void.

In this last case the law of the state was in direct conflict with that of congress. The latter said in effect to its licensee, you are authorized to navigate the waters of New York with vessels propelled by steam, while the former said you shall not do so.

But in this case there is no necessary conflict between the law of the state and the United States. A license to engage in the coasting trade on the Wallamet river is a license to navigate only so far as it may be navigable. But if the state in the exercise of its police power to build bridges obstructs or even destroys the navigation of the river, the weight of authority, and I think of prudential reason, is that the act of congress licensing the plaintiff's steamboat

to navigate it, is not thereby infringed. It is thought to be safer for the courts not to assume that congress intended to interfere with and restrain the power of the state over the navigability of the rivers within its jurisdiction, until it says so directly or by necessary implication.

Therefore, in the cases of *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. 245; *The Passaic Bridges*, 3 Wall. 782, and *Gilman v. Philadelphia*, Id. 713, it was held that the enrolment and license acts, which authorized vessels to navigate the waters of particular states, were not sufficient to warrant the inference that congress thereby intended to limit the right of the states to dam or otherwise obstruct the navigation of said waters.

Does the act of February 14, 1859, *supra*, conflict with the act of the state legislature authorizing the erection of this bridge? This act, unlike the one providing for the enrolment and license of vessels, relates directly to the navigability of the waters within the state. Its only purpose is to preserve them for the free use of all the citizens of the United States as common highways. It was passed by congress in pursuance of its control over them as a means of commerce (*Pollard v. Hogan*, 3 How. 229), to secure their free navigability to the inhabitants of the Union, against the possible exactions and obstructions of local authority, prompted by considerations of local convenience or selfishness.

The provision, even to its very language, is as old as the articles of compact between the original states and the people and the states of the territory north-west of the Ohio, contained in the ordinance of 1787, for the government of said territory, from the fourth of which it is copied. This ordinance was ratified or recognized by the first congress under the constitution (1 Stat. 50), and the provision securing the freedom of "the navigable waters leading into the Mississippi and St. Lawrence," has been continued in force in all the states formed out of said territory to this day. (*Columbus Ins. Co. v. Curtenius*, 6 McLean, 209.)

In *Pennsylvania v. W. & B. Bridge Co.*, 13 How. 518, it was held that a provision in a compact (December 18, 1789) be-

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tween Virginia and Kentucky concerning the erection of the latter into a state, to the effect that the navigation of the Ohio, so far as the territory of the two states joined thereon, "shall be free and common to the citizens of the United States," which was afterwards sanctioned by congress in the passage of the act (1 Stat. 189) admitting Kentucky into the Union, was a restraint upon the power of Virginia to obstruct the navigation of said river by the erection of a bridge thereon within her own limits, and that a bridge so erected which was a substantial obstruction to such navigation, was a nuisance and unlawful.

To the same effect is the decision in *Columbus Ins. Co. v. Curtinius*, *supra*, in which it was held that congress had declared, by the ordinance of 1787, and otherwise, that the navigable tributaries of the Mississippi were free and common highways to the citizens of the United States, and that therefore an act of the legislature of Illinois, authorizing the construction of a bridge across the Illinois river, near Peoria, was void, if such bridge was a material obstruction to the navigation of said river, as being in conflict with the federal legislation declaring it free and common.

These decisions are the authoritative and uncontradicted exposition of the effect of federal legislation declaring a navigable river forever free and common to the citizens of the United States, upon the otherwise unlimited power of a state to obstruct or impede the navigation thereof within its own limits. And the reasoning upon which they rest seems unanswerable. It is self-evident that a river cannot be a common highway, forever free to all the citizens of the United States, which the legislature of any one state has the power to essentially obstruct.

In a well-considered case, cited by the defendant (*The People v. S. & R. Railway Company*, 15 Wend. 132), in which the right to bridge the Hudson river in pursuance of an act of the state legislature was under consideration, Mr. Chief Justice Savage announced the same conclusion, saying: "The place where * * * the bridge is built is one which coasting vessels have a right to pass, and where any

obstruction entirely preventing or essentially impeding the navigation would be unlawful."

In comparing the federal and state act to ascertain if there is any conflict between them, the circumstances of the case—that is, the character and relative importance of the river and the commerce dependent thereon, and the character and need of the bridge and the commerce dependent upon it—must be considered. For although congress has, in effect, declared the Wallamet river to be forever a "free" and "common highway," yet these terms are used with the implied understanding that the state has the power to bridge it, if it can do so without materially impeding the navigation.

What is such an impediment may be a difficult question to decide. It may depend much upon circumstances. A bridge of a certain character at a certain place may be of great benefit and convenience to a few people or some petty local trade or business, but a serious inconvenience or injury to many people and a valuable and extensive commerce.

The commerce of Oregon, both domestic and foreign, is largely dependent upon the free navigation of the Wallamet river. Steamboats ply upon it most of the year for one hundred miles or more south of Portland. At Portland the tide ebbs and flows, and from there to its mouth, a distance of twelve miles, it is navigated by sea and inland vessels, foreign and domestic, sail and steam, that go thence up and down the great Columbia, out upon the Pacific ocean and to all the principal ports of the world. It is the harbor of Portland, the emporium and financial centre of the northwest, where the valuable products of the country are gathered from far and near and stored for market and exportation, and the imports from sister states and foreign countries are received and distributed throughout the interior.

In the near future we may expect a large increase of population at this place, and throughout the country with which it maintains business relations, and the commerce of Portland will demand the free use of the harbor and water front, as far south as it can be made useful.

The present need of a bridge is to furnish a more conven-

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ient and certain means of crossing the river than a steam ferry, to the small population that live in East Portland and the neighboring villages—some portion of the passengers to and from Portland on the east-side railway—the rural population that live on the narrow strip of country between East Portland and the Columbia river, and the transportation of their limited dairy and garden products to the Portland markets.

It is not intended by this statement to suggest that there is no need of a bridge across the river at this place, but only that the interests which may be promoted by it are as a drop in the bucket compared with those that may be seriously inconvenienced or injured by it.

With this brief sketch of the circumstances, I proceed to consider whether the act authorizing the building of the bridge is in conflict with the act of congress declaring it a free and commercial highway.

The bridge is required to be built so “as not to injuriously impede and obstruct the free navigation of the river.” But the defendant claims that the provision requiring the draw to be not less than one hundred feet, is equivalent to declaring that a draw of one hundred feet is sufficient. My own impression is, that the act ought to be construed as authorizing a bridge which would not materially interfere with navigation—and to this end, that the draw must be at least one hundred feet, and as much longer as necessary, and that the defendant is not justified thereby in building a bridge with a draw of only one hundred feet, if that would materially interfere with the navigation. But if the construction claimed by the defendant is the correct one, it comes to the same thing in the end. The legislature of the state has not the power to say absolutely that a bridge may be built with only a draw of one hundred feet, for if such a bridge interferes materially with the free navigation of the river, the act authorizing it is void, as being in conflict with the paramount law of congress declaring the river a free and common highway. Therefore it is, that a bridge ought not to be attempted to be built across such a water as this, where so many and valuable interests are involved,

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without the sanction of congress given through the engineer department. The proper location and elevation of a bridge across the river at this place, and the length and place of draw, all the circumstances considered, are questions that more properly pertain to the political than the judicial department of the government.

There the matter may be "equitably adjusted," so to speak, according to the circumstances of each case. Here, the court can only ascertain whether the proposed structure interferes materially with the free navigation of the river, and if it does, it must declare it unlawful.

Accordingly, within the past fifteen years, congress has been induced to legislate generally and specially upon the subject of bridges across the Mississippi and its tributaries. By the act of December 17, 1872 (11 Stat. 398), it is provided that no bridge can be built across the Ohio river without complying with the directions of that act, one of which is, that every bridge below the suspension one at Cincinnati, shall have a high span of one hundred feet above low water with a space of four hundred feet between the piers, and a pivot-draw with two clear openings of one hundred and sixty feet each; and by act of April 1, 1872 (17 Stat. 44), a railway bridge was authorized across the Mississippi, near Clinton, Iowa, with a draw of not less than one hundred and sixty feet, the same to be located, built, and kept subject to the directions of the secretary of war for the security of navigation, subject even then, to be abated as a nuisance by a suit in the United States court, if it should prove an obstruction to the navigation of the river; and by the act of June 4, 1872 (17 Stat. 215), it is provided that all bridges thereafter built across the Mississippi by authority of congress, shall be subject to the same direction and control of the secretary of war.

By an act of July 25, 1866 (14 Stat. 244), congress authorized the building of seven bridges across the Mississippi at different points above St. Louis, and one across the Missouri at Kansas City, and provided that each of them should have two draw-openings of not less than one hundred and sixty feet in the clear. By acts of February 24,

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1871 (16 Stat. 430), and March 3, 1871 (16 Stat. 473), bridges were authorized across the Missouri river at Omaha, Neb., and Louisiana, Mo., with two draw-openings of not less than two hundred feet in the clear.

These citations of congressional action might be multiplied greatly. (See report of Gouverneur K. Warren, U. S. Maj. of Eng., on bridging the Mississippi between St. Paul and St. Louis, 1878, pp. 193-202.)

Indeed, congress has spoken on the subject of bridging the Wallamet at this place. By act of February 2, 1870 (16 Stat. 64), the city of Portland was authorized to bridge the river under the direction of the secretary of war, so as "not to obstruct, impair, or injuriously modify the navigation" of the same. This act expired by its own limitation within six years, and nothing was done under it but an examination and approval of a plan by a board of engineers and the secretary, December 30, 1872.

By this plan the bridge was located at the foot of Columbia street—one thousand eight hundred and twenty feet above Morrison—and was to have a draw of one hundred feet in the clear on each side of the pivot pier. And on June 23, 1874 (18 Stat. 281), congress authorized the Oregon & California Railway Company to bridge the Wallamet river at Portland, under the direction of the secretary of war in all respects, except that the draw should be not less than three hundred feet in width, so as "not to obstruct, impair, or injuriously affect the navigation of the same." Nothing has been done under this act, but it is still in force.

Taking these instances of congressional action as a reasonable indication as to what is necessary in the construction of a bridge over this and other navigable waters of no more importance than this, and navigated with vessels of less tonnage, to prevent the navigation from being injuriously affected thereby, and weighing the testimony in the case, I think this bridge is such an obstruction to the navigation of the Wallamet as prevents its being a free and common highway, to the citizens of the United States, and is therefore a nuisance and unlawful. Indeed, I have no

doubt of it. Forty-two persons, mostly navigators, including, I think, nearly all the pilots on the Columbia and Wallamet rivers, testify unqualifiedly that the draw is too narrow and ought to be two hundred feet instead of one hundred; and that in the winter season especially, the time when vessels usually load with grain for foreign ports, owing to the strong currents and high winds, it will be very unsafe to go through the draw with a good-sized river steamboat, let alone a tug and sail vessel occupying a space from seventy to eighty feet.

The United States engineer in charge of the river and harbor improvements in this district, Colonel George L. Gillespie, U. S. A., reports to the chief of engineers at Washington, on December 29, 1880, at length upon the subject of this bridge, and concludes that it should have been located at Columbia street, but if allowed to be constructed at Morrison, the draw should be enlarged to not less than two hundred feet, and that a bridge there with a draw of only one hundred feet will result in frequent loss to shipping, and may prevent seagoing vessels from going above the bridge altogether.

In reply to this mass of testimony the defendant has introduced six affidavits, one of them being from the contractor and another from the president of the company: only two of them being from river pilots.

The principal point made in them is, that the bridge will be more dangerous to navigation if left in its present condition, than if completed. But a sufficient answer to this is, that a court may require by the injunction that the defendant undo what he has done amiss, as well as to refrain from so doing (*C. S. M. Co. v. V. & G. H. W. Co.*, 1 Saw. 482.)

In my judgment the preliminary injunction should be allowed. The defendant ought not to be permitted, against this showing, to place this structure in the river until its right to do so is definitely ascertained and determined. I am surprised that any person should have the hardihood to undertake such an important enterprise in the face of the act of February 14, 1859, *supra*, declaring the river a com-

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mon highway, and the congressional legislation of the last fifteen years upon the subject of bridging navigable waters of the United States, without first obtaining the sanction of congress. But this being a matter of some moment to the defendant, I have concluded to delay the issuing of the injunction until the first day of the next term, April 11th, or as soon thereafter as the circuit judge is present, when the matter may be further heard if the defendant desires it; and in the mean time the defendant will be restrained by order, as prayed in the bill.

APRIL 16, 1881.

The motion for an injunction was further heard before SAWYER, Circuit Judge, and DEADY, District Judge.

1. INJUNCTION.—A preliminary injunction granted to restrain the erection of a bridge across the Wallamet river, at Portland, contrary to the act of congress (11 Stat. 383) declaring the navigable waters of the state free and common highways, at the suit of a riparian owner injured thereby.
2. OBSTRUCTION TO NAVIGATION.—Where congress has declared a navigable river to be a common highway, the state cannot authorize an obstruction therein, and anything which materially interferes with or limits the navigability thereof, considering the use which it is or may be subject to, is an obstruction and a violation of such act of congress, which the United States circuit court has jurisdiction, under the judiciary act of 1875 (18 Stat. 470) to prevent or abate by injunction.
3. DELAY IN APPLYING FOR INJUNCTION in this case not a ground for denying it.

Hugh T. Bingham, Edward Bingham, and E. C. Bronnaugh,
for plaintiff.

H. Y. Thompson, W. Lair Hill, and C. B. Bellinger,
for defendant.

DEADY, J. This application was first heard before me sitting in this court alone, and on April 6th I delivered an opinion thereon, to the effect that the bridge where, and as it was being constructed by the defendant, was a serious obstruction to the navigation of the Wallamet river, contrary to the act of congress of February 14, 1859 (11 Stat. 383), admitting the state into the union, which declares,

that all the navigable waters of the state “shall be common highways and forever free” to all the citizens of the United States; and that this court, under section 1 of the act of March 3, 1875 (18 Stat. 470), giving it jurisdiction of a suit arising under an act of congress, has authority to restrain parties from violating said act by obstructing the navigation of any of said waters at the suit of any one injured thereby.

But considering the importance of the matter to the defendant, I did not then direct the injunction to issue, but continued the application for further hearing, upon the same and such additional evidence as the parties might produce, when the circuit judge, Mr. Justice Sawyer, should be present, and restrained the defendant as prayed in the bill in the mean time. That hearing has been had, and the conclusion reached by the circuit judge will now be announced by him.

As preliminary thereto, I merely wish to say for myself that the further thorough investigation of this question and able argument of the case *pro* and *con*, has only deepened my conviction that the proposed bridge is and will be a nuisance and serious impediment to the navigation of this river.

The law of the case, upon which the contention mainly turned upon the first hearing, is now admitted by the defendant to be correctly stated in the opinion then delivered by myself. The only remaining question for consideration is, will the erection of this bridge seriously impair or affect the navigability of the river? If it appears probable that it will, the defendant ought not to be allowed to proceed further in the commission of the wrong. It has been well said, by some scientific authority upon this subject, that any bridge is a serious obstruction to the navigation of a river, which can be essentially improved. Upon the evidence and in the very nature of things there can be no doubt that this bridge where and as it is being constructed is a serious obstruction to the navigation of the river.

It will absolutely obstruct the navigation of the river, except for the space of one hundred feet on either side of the pivot pier, and these openings are altogether too narrow to

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admit the safe and convenient passage of the sea-going vessels that come to this port, or even the larger class of river boats, except in favorable conditions of wind and water. Indeed, the further investigation of this matter makes it appear very probable to my mind that no bridge, unless it be a suspension one, can be constructed over the river at this point, without being a serious obstruction to its navigability and impairing its usefulness as a common highway for the citizens of the United States.

The Wallamet river in front of Portland is not only a navigable stream with a ship channel. It is also a seaport—the harbor, as I have before said, of “the emporium and financial centre of the north-west,” and to all appearance is destined to be second to no city in importance on the Pacific coast, save one. Probably nine tenths of the exports produced west of the Rocky mountains and north of the forty-second parallel are gathered here for sale and shipment abroad upon sea-going vessels, of, in some cases, three thousand tons burden. Every bushel of grain grown for export over this vast region, and particularly in the great Wallamet valley, feels the cost of storage and dockage at this port, and anything which limits or restricts the capacity or convenience of its harbor, works a direct injury to the great body of the producers throughout the country. Therefore it is, that the convenience of the comparatively small population immediately east of Portland, or even in Portland, is not alone to be considered in this matter.

The river is the navigable water of the people of the United States, and the harbor is for the free use of all the people whose exports and imports freight the vessels that frequent it from all parts of the world. At this point, on the west bank of the river, the ox teams of the Wallamet valley first met the sea-going vessel, and the traffic between them was the beginning of Oregon's commerce. Out of this commerce grew the town of Portland. But destroy or materially restrict or impede the free use of this harbor or the approaches to it, and so far you destroy the town and injure the commerce of the country.

The injunction ought to be allowed.

SAWYER, Circuit Judge. I have very little to add to what the district judge has said. I fully concur in the conclusions he has reached.

Under the admitted law of the case—the act admitting the state into the Union—which provides that the navigable waters of the state shall be free and common highways, and in view of the decision of the supreme court in the *Wheeling Bridge case*, 13 How. 518, in which it was held, under a similar act, that any obstruction to the navigation of the Ohio river was unlawful, except by the consent of congress; and the judiciary act of March 3, 1875, giving the court jurisdiction of a suit arising out of an act of congress, it is very clear that this court has authority to restrain the defendant from placing any structure in this river which will obstruct its navigation.

The only remaining question, then, is, whether the bridge now being constructed by the defendant, will be such an obstruction. To my mind, the testimony clearly indicates that the bridge is, and will be, an unlawful obstruction to navigation. And I think this must be apparent to every person familiar with the subject, or even of general intelligence. If it is at all a material obstruction, it comes within the inhibition of the statute, and is unlawful.

It was argued by counsel for the defendant, that the commerce of the country is not all carried on up and down, or upon the river, and that the commerce and convenience of the people which cross it must be taken into consideration, in determining the propriety of bridging it. It may be of importance to the cities upon either bank of the river that they should have communication by means of a bridge. But these are considerations to be addressed to a tribunal other than this court. They should be addressed to congress, where, upon an application for permission to bridge the river, these conflicting interests can be considered and adjusted, as may be thought best for the public good.

But this court is simply authorized to ascertain whether the bridge will be a material obstruction to the navigation of the river. It cannot balance these conflicting interests, and determine that the one will be more benefited by the

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bridge, than the other will be injured thereby. Its power is confined to the determination of the question, whether it will be a material obstruction to navigation or not.

In the *Wheeling Bridge case*, the obstruction caused by the bridge, as compared with the benefit, was exceedingly small. That suit was commenced in 1849, when the commerce on the Ohio was, perhaps, more extensive than now, and the bridge was a connecting link in a great public highway by rail and otherwise.

The referee reported, that of all the steamboats then running on the river, only nine were prevented from passing the bridge on account of the great height—from sixty-three and a half to eighty feet—of their “chimneys,” and most of them for only a few days in the year. Although these chimneys might have been shortened or lowered, when passing the bridge, by means of hinges, and although the benefit resulting to navigation, in the increased draft given by such tall chimneys, must have been small in comparison to the benefit to commerce resulting from the bridge, yet the latter was determined to be a violation of the act of congress declaring the navigation of the river “free and common to the citizens of the United States,” and the court ordered it abated as a nuisance. As I said during the hearing, it appears from the evidence that the draw is too narrow to admit the passage of the larger vessels that come here, with safety, and on that account the bridge is an obstruction to navigation; and I am satisfied that the further investigation of the subject will make this more apparent. But I am, also, satisfied that this bridge, whatever the width of the draw, will be an obstruction, if erected in the midst of this harbor.

In the course of the argument the question was asked of counsel: Would not even these piers, without a bridge upon them, standing where they are, be regarded as a nuisance, and have to be removed? And the proposition could not be denied. If put there for no useful purpose, their presence would not for a moment be tolerated, by reason of their obstruction to navigation. The fact that you put a bridge upon them does not render them any the less an

obstruction, but more so. Located, as it is, in the midst of the harbor, where vessels are required to move constantly from place to place, without a passage except at the single point of this draw, the bridge will be a serious obstruction to navigation in the harbor, even if the draw was sufficient for the passage of vessels up and down the stream.

The act of congress does not limit the free navigation of the river to a particular part or channel, but it declares the whole river a free and common highway to the full extent of its capability of navigation. A bridge may not be a material obstruction to the navigation of a river, if erected at a point where vessels simply pass up and down the channel on their way to and from a port. But in the case of a harbor like this, the location, surroundings, and circumstances must be considered, and they may require that no part of it be obstructed, or closed to navigation. In this view of the matter, I think that any bridge in this harbor would, necessarily, be such an obstruction to its navigation as to require the consent of congress to justify it.

This place is a commercial centre—the second port in importance on the Pacific coast—mainly because ocean vessels of a large size can come to its docks. Therefore, it is a serious question whether the people of Portland, or the state of Oregon, can afford to allow a bridge to be built in the midst of this harbor, at a point where ships must congregate, and thereby create such an obstruction therein as may, and probably will, turn the commerce of the city into other channels. This harbor is not large, and when the shipping here is much increased, as it, doubtless, will be with the growth of the country and the place, there will be no room to spare in it. Ships often remain in the harbor of San Francisco three or four months, awaiting employment. But they could not afford to incur the expense of lying at the docks all this time. They pay wharfage a few days while at the docks, discharging or taking in cargo, and in the mean time draw out into the stream, where they can lie without expense.

All the navigable waters of this harbor will be needed for the use and accommodation of shipping. In San Francisco,

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where a large portion of the shipping lies out in the stream, my recollection from judicial investigation is that a clear passage-way of six hundred feet or yards—I think the latter—from the end of the wharves is always kept open; and even then collisions occur, as the records of the courts there will show.

All these things are to be considered in determining whether it is good policy, even if congress could be brought to consent to it, to bisect this harbor with a bridge that would render it unnavigable along its line, except at a particular point.

But when we consider the commerce of the city, the size of the harbor, and the character of the vessels that come to the port, we think the erection of this bridge will prove a great obstruction to the navigation of the river, both on account of the insufficiency of the draw and generally, considered as a bridge, and therefore be injurious to the plaintiffs; and so considering, we feel bound to grant this injunction.

Objection has been made that the plaintiffs have been guilty of delay in applying for this preliminary injunction. There are cases in which such an objection has force, but it does not apply here. This is a matter in which a large number of people are interested, and usually what is everybody's business is nobody's business. It is a great task for any one man to undertake to conduct a litigation against a large company, and it is one he would not undertake unless compelled to do so. It is alleged in the bill, and the evidence shows, that the plaintiffs have actually been compelled to sue, because the owners of vessels have refused to take them to their wharves on account of the danger of passing this structure, even in its present condition, when there is something more than the mere draw to go through. And they may not have been aware of the extent that the bridge would prove an obstruction, until it was so developed and shown. The bill was filed in January, and I think there has been no great delay—the circumstances considered.

Another satisfactory answer to this objection is the fact, that upon the evidence now in the case, or that is ever likely

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to be introduced, and the knowledge which is open to every one, in all probability this injunction must be finally granted.

If the injunction is not now issued and the defendant is allowed to go on and finish the bridge before the final determination of this suit, it would then have to be removed, if the court so adjudged, as it probably would, unless congress in the mean time should see fit to authorize it, as it did the Wheeling bridge, which, considering the character of the obstruction, we are not authorized to assume.

The amount of the bond to be given by the plaintiffs, I will leave to be settled before the district judge.

DEADY, J. For the convenience of parties, I now say that I think the bond ought to be given in a sum not exceeding twenty-five thousand dollars, and that unless cause is shown to the contrary, the order of the court will be that the injunction issue upon the plaintiffs' giving bond in that sum with sufficient sureties, to be executed before and to be approved by the master of this court, Mr. William B. Gilbert.

HERMAN SHAINWALD, ASSIGNEE ETC., v. HARRIS LEWIS.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

MARCH 30, 1881.

1. WHERE A DECREE IN EQUITY is obtained against a defendant for a sum of money, and execution has been returned unsatisfied, a court of equity has jurisdiction of a bill alleging that the defendant has secreted his property, and is disposing of the same with the avowed intent of defrauding the complainant, and depriving him of the fruits of his decree, and praying an injunction and receiver. It is not necessary in such a bill to particularly describe the assets, whether equitable or not, sought to be reached, and a court of equity will issue an injunction, appoint a receiver, and compel an assignment of all the property of the defendant, when such action is necessary to defeat the fraudulent designs of the defendant.
2. QUÆRE.—Whether, upon such a showing to the court by petition in the original suit, a writ of sequestration may not issue?
3. QUÆRE.—Whether, under such an original decree, and upon the showing above mentioned, the court has not the power to issue an injunction and

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make an order for a receiver and assignment, without requiring the complainant to file a so-called creditor's bill, or to wait for the return of an execution unsatisfied?

Before HOFFMAN, District Judge.

James L. Crittenden, for plaintiff.

Delos Lake, for respondent.

HOFFMAN, J. On the fifth day of November, 1880, a decree was entered in this court against the above-named respondent, by which he was adjudged to have obtained possession of the funds of the bankrupt firm of which the complainant is assignee, by fraud and collusion, and by means of fraudulent and collusive judgments against the firm founded on fictitious debts. He was, therefore, decreed to be a trustee for the complainant of all such funds, and was required to pay over to the complainant the amount thereof as ascertained by the decree. On this decree an execution was issued and returned unsatisfied.

A bill was thereupon filed by the complainant setting forth the previous proceedings in the cause, and averring that respondent had procured a homestead to be declared upon his land—had sold valuable real estate, and threatens, intends, and is about to leave and depart the United States, and take and carry with him all his money and other property, with the intent, object, purpose, and design of preventing the same from being levied upon or applied in satisfaction of said decree, and with intent to hinder, delay, and defraud this complainant of the moneys and property to which he is entitled under said decree. That since the enrolling of said decree the respondent has secretly transferred a large part of his property to divers persons, and has secreted the remainder of his property with the intent and design aforesaid, and to prevent said property from being seized on execution or secured or applied to satisfy said decree. That the respondent has stated and declared to divers persons, that he had so fixed his property that it could not be seized to satisfy said decree. That the respondent has property debts and other equitable interests

to the value of ninety thousand dollars, exclusive of all just prior claims thereto, which the complainant has been unable to reach by execution. That the action is not commenced by collusion with respondent or with any other person for the purpose of protecting the property or effects of the respondent against the claims of other creditors.

The bill contains the usual prayer for an injunction for a receiver and for other relief. Upon this bill an injunction was issued and a receiver appointed, to whom the respondent was ordered to make an assignment of all his property and effects. This he at first refused to do, and was committed for contempt.

At a subsequent day he executed the assignment, which, by order of the court, remained in the custody of the clerk until the hearing and decision of the present motion to vacate the order appointing a receiver, and for the execution of the assignment. That motion has accordingly been made and argued. It is based on the grounds:

1. That the bill of complaint herein does not disclose any equitable ground for the appointment either of a receiver or referee.

2. That upon the facts disclosed in the affidavits and papers filed herein, the appointment of a receiver or referee is unnecessary. The notice of motion states "that it is based upon the affidavits of the respondent herein, with copies of which you are herewith served, and upon all and singular the records, papers, files, and proceedings in this suit."

At the hearing of the motion an amended bill was presented and read as an affidavit. It is unnecessary to detail at length its averments. It is sufficient to say that they corroborate the allegations of the bill, and of the affidavits in support of it, and state other facts tending to show the absolute necessity for the immediate appointment of a receiver to prevent the loss to the complainant of the property and assets of the respondent and of the trusts funds invested by him in the goods, wares, and merchandise contained in a certain store in the state of Nevada owned by him.

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The amended bill further alleges the institution, in the state of Nevada, of a collusive suit by a pretended creditor of the respondent, founded on a fraudulent and fictitious indebtedness, with intent to have the proceeds of said trust funds in the state of Nevada seized and sold under execution, and with the design of hindering, delaying, and defrauding the complainant.

If these allegations are true, or even partially true, a stronger case for the appointment of a receiver could not well be imagined. Unless this court can interpose in the most summary manner the complainant will be remediless, and its decree abortive.

The motion to set aside the order for the appointment of a receiver is not based on any denial of the facts alleged in the bills and affidavits, of which a summary has been given. It is rested on the denial of the jurisdiction of a court of equity to afford the relief prayed for.

It is contended that the jurisdiction exercised in the courts of chancery in New York to entertain what the counsel denominates "a fishing creditor's bill," is entirely the creature of the statutes of that state. That independently of those statutes, equity could only entertain a creditor's bill filed for the purpose of removing fraudulent impediments or obstructions to the service of an execution against real or personal property, or for the purpose of subjecting equitable assets to the operation of the execution when the same had been returned unsatisfied, and the legal remedy thereby shown to have been exhausted. But it is contended that in such cases the equitable assets must be described and indicated in the bill, or in a supplemental or amended bill if afterwards discovered.

It is also contended that the bill in this case must be considered precisely as if founded on an ordinary money judgment at law, and that no notice can be taken of the fact established by the original decree, that the demand arose out of a fraud and conspiracy of the grossest kind, and that the respondent has been adjudged a trustee of the funds thus fraudulently obtained and appropriated. All jurisdiction to arrest a fraudulent judgment debtor in the exe-

cution of an avowed purpose to transfer, secrete, and make way with his property, in order to defeat the claim of his judgment creditor, is denied unless the creditor can describe and indicate the secreted property. And, even in that case (unless the position of counsel is misapprehended), the property so described must be equitable assets which cannot be reached by an execution at law. But in this state equitable assets *can* be reached by an execution at law. The aid of equity to reach such assets when known would not be required, and the jurisdiction of the court to entertain creditors' bills would be limited, if the position of counsel be correct, to bills of the first class above mentioned, viz.: bills filed to remove obstructions or impediments to an execution.

I think it can be shown that the contention of counsel, that the equity jurisdiction exercised by the court of chancery in New York was exclusively derived from the revised statutes of that state, is an erroneous view of the origin and foundation of that jurisdiction. The point was elaborately considered by the vice-chancellor in *Storm v. Waddell*, 2 Sandf. Ch. 510-512. In that case he observes: "The practice of filing bills in this court by unsatisfied judgment and execution creditors, which has become so well established and familiar, is usually referred to the revised statutes as its origin." (2 R. S. 173, 174.) The statute is undoubtedly sufficient to sustain all the argument that was presented in support of the effect of such a suit; but, as I desire to refer to cases prior to the time when the revised statutes went into operation, I will advert briefly to the earlier history of this jurisdiction. "The power of the court of chancery to aid in removing fraudulent impediments in the way of levying on the personal property liable to execution, or selling the real estate of his debtor, is an old established ground of jurisdiction, which is not in question here. The bill in those cases was auxiliary to the carrying into effect the process of the law courts, and differed from our creditor's suit, now under consideration, in this, that in the suit to set aside a fraudulent conveyance of land, so as to give effect to a judgment, the bill need not allege

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anything more than the recovery of the judgment; and where it was to remove an obstruction affecting movable property, it was only requisite to allege an execution issued to the county where the property was situated; while in the creditor's bill, against equitable interests and things in action, the creditor must show the issuing of an execution, and its regular return unsatisfied. In the case of *Spader v. Hadden* (5 Johns. Ch. 280), Chancellor Kent, in 1821, sustained a creditor's suit of the description now in use against moneys in the hands of Hadden, transferred to him by the debtor—the transfer being fraudulent against creditors. This decree was affirmed by the court of errors in November, 1822 (20 Johns. 554). A majority of the court, with Chief Justice Spencer and Mr. Justice Woodworth (the latter delivered the prevailing opinion), concurred in holding that the case was one of acknowledged equitable cognizance, and the reasoning of the judge is applicable as well to the case of *funds being in the debtor's hands* as to the case decided. It is true that in *Donavan v. Fin* (Hopk. 59-77), decided in November, 1823, the chancellor omitted to follow the result of the decision in *Hadden v. Spader*, and viewed the latter as a case of trust and fraud. But I submit with great respect that there was much more in the decision than was acceded to it in *Donavan v. Fin*. The goods assigned in *Hadden v. Spader* were sold and converted into money five months before Spader recovered his judgment, so that there was no property on which his execution could have been a lien. It was, then, the plain case of a debtor having things in action in the hands of a third person, and equity deemed it unjust that either the one or the other should withhold them from the payment of his creditors.

“The doctrine of *Donavan v. Fin* has not been followed in any case since, nor, so far as I have seen, approved by more than two judges. There is abundant evidence that it was not deemed in accordance with the decision of the highest court, in *Hadden v. Spader*. And, aside from the books, I know from my own practice that it was disregarded prior to the time of the revised statutes. In the following

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cases the contrary was decided, or opinions to that effect given: In *Weed v. Pierce*, 9 Cow. 722-727, decided by Chancellor Walworth when circuit judge, sitting in equity, December, 1827; *Beck v. Burdett*, 1 Paige, 305, January, 1829; *Chandler v. Pettit*, 1 Id. 427—affirmed on appeal in December, 1829, 3 Wend. 618, 621-625; and *Edmeston v. Lyde*, 1 Paige, 673, November, 1829. In *Wakeman v. Grover*, 4 Paige, 23, affirmed 11 Wend. 187, the bill was filed in 1828 to reach the things in action assigned, *as the goods of Grover & Gunn*, and the decree was made against both species of property without discrimination, although the case was most desperately contested throughout. The chancellor repeated the doctrine of the above cases, at page 33 of 4 Paige; and, as recently as in 1844, he reiterated it in *Furnham v. Campbell*, 10 Paige, 601. See, also, the Reviser's Notes, in introducing the provisions on the subject, which are contained in the revised statutes. (3 R. S. 669, 2d ed.) I may, therefore, assume that by the law of this state, as settled more than twenty years before this case arose, an unsatisfied execution creditor had a right to file a bill in this court to compel payment of his debt out of the equitable interests and things in action of the judgment debtor. (*Storm v. Waddell*, 2 Sandf. Ch. 510-512.)"

The authorities cited by the assistant vice-chancellor strongly support his reasoning; and I am justified in holding that, by the ancient usages of courts of equity, as understood in New York prior to the revised statutes, chancery "would assist a judgment creditor at law in discovering and reaching personal property which had been placed in other hands; and that it made no difference whether that property consisted of *choses in action*, or money, or stock." (2 Kent's Com. 561.)

In *Donavan v. Fin*, the point decided was, that "where the subject of a suit is exclusively legal, equity has no jurisdiction to enforce or give a better remedy;" that is, to seize upon and apply to the payment of the debt equitable assets, which could not be reached by execution at law.

In *Pettit v. Chandler*, 3 Wend. 624, the same point arose incidentally, though it was not decided; but the chief jus-

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tice said, "*his impressions were that, under the existing law (1829), a defendant is not bound to answer as to property which never was within reach of an execution; that he could only be called on to respond as to such property as he has fraudulently withdrawn from the operation of an execution.*"

In *Hadden v. Spader*, Mr. Justice Woodworth held that a judgment creditor after exhausting the remedies given by law could reach the trust property of his debtor by the aid of a court of equity, and that he could resort to the debtor's *stocks and debts* due to him, *even when the stocks were not purchased or the debts created by means of the property fraudulently withdrawn from the judgment of the creditor.* To these views Chief Justice Spencer gave his explicit sanction.

Chancellor Sandford was of opinion, as we have seen, that the relief could only be given in cases which were themselves of equitable jurisdiction involving fraud or trust, or seeking to subject to the satisfaction of a judgment, property in itself liable to execution by removing a conveyance which operated as a fraudulent impediment to the execution.

In *Pettit v. Chandler*, the chief justice, Mr. J. Marcy, and Mr. J. Sutherland declined to express any final opinion as to this contested boundary of jurisdiction, for the power to grant relief to the utmost extent it was pushed in the case of *Hadden v. Spader* was about to become in a very few days a part of the system of jurisprudence of New York "*by legislative recognition or adoption.*" This case was decided in December, 1829. The revised statutes of New York went into operation January 1, 1830.

The case at bar does not demand any attempt on my part to determine this disputed question as to the jurisdiction of courts of equity upon which so eminent judges have differed, for the statute of this state permits all choses in action and equitable assets to be reached by execution of law. The objection, therefore, to the jurisdiction chiefly relied on by Chancellor Sandford in *Donovan v. Fin*, cannot here be raised. The bill, moreover, in this case is not a bill to reach equitable assets alone. It is a bill for an injunction

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and receiver to prevent the defendant from secreting, conveying away, and converting into money, property which is justly subject to execution, including property which is in whole or in part the proceeds of the property fraudulently obtained and converted by him. It seeks to arrest and baffle the execution of an avowed purpose to evade the decree of this court and to render it fruitless to the bankrupt's creditors, whom he has defrauded.

But the question upon which the conflict of opinion arose in New York seems, so far as the United States courts are concerned, to be authoritatively settled. In *Board of Public Works v. Columbia College*, 17 Wall. 530, the supreme court says: "The jurisdiction of a court of equity to reach the property of a debtor, justly applicable to the payment of his debts, even where there is no specific lien on the property, is undoubted."

It is objected, that even if a court of equity has jurisdiction to reach assets of every description in aid of a judgment creditor, it can only do so where the assets are indicated in the bill, and that it has no authority upon mere general allegations, such as those contained in this bill, to enjoin the defendant or to compel an assignment of all his property to a receiver appointed by the court. It is contended, that the mode of proceeding adopted in this case is peculiar to the state of New York, where it grew up under the rules framed by Chancellor Walworth, to carry into effect the provisions of the revised statutes of that state with regard to creditors' bills. But it would seem that Mr. J. McLean entertained bills similar to the bill in this case, without hesitation. In *Lamon et al. v. Clark*, 4 McLean, 18, the bill alleged that "the defendant had equitable things in action and other property which cannot be reached by execution, and that he also *had debts due to him by persons unknown*." These allegations are as general and unspecific as those contained in the bill under consideration, but the bill was nevertheless entertained.

It is asserted by counsel, that this jurisdiction was taken under a statute of Michigan, similar to that of New York. But the court expressly repudiated the notion that a state

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statute can confer jurisdiction in equity upon the courts of the United States, although the latter may adopt modes of proceeding and particular remedies, when the cause is within their jurisdiction and the proceedings adopted are conformable to the general principles by which courts of equity are governed. And with respect to the case before it, the court observes: "The jurisdiction is appropriate to chancery, and *may be exercised where there is no special statute*. Similar relief is given in England. (1 Vern. 398; 1 P. Wms. 445; 2 Dickens, 575; Ambl. 79-455; 20 Johns. 563; 2 Johns. Ch. 283-296; 4 Id. 691.)"

In *Pettit v. Chandler*, before cited, the bill, after alleging judgment obtained, execution issued, and return of *nulla bona*, proceeded to state, that "for a long time before the recovery of the judgments, Pettit had transacted, in his own name, business to a large amount in New York, and was possessed of great property, and that he had not pretended or given out that he had become insolvent, or had lost any property, but that just before the recovery of the judgments in favor of the complainant he had suddenly stopped doing business in his own name, with the avowed intention of preventing the complainant from obtaining satisfaction of his judgments; that he had so placed his property that none of it was left visible so as to be taken upon execution, with the intent to defraud the complainant; and it particularly charged that Pettit, at the filing of the second supplemental bill, *was possessed of real or personal property, or other property of some name or nature*, to a large amount; that he was possessed of, or entitled to, public stocks, to *stock in banks*, or other incorporated companies, and to rents in real estate; that he held bills of exchange, promissory notes, and choses in action, to a large amount; and that property, *real or personal*, was held by others in trust for him, and by colorable title. The bill stated and enumerated particular acts of fraud which it charged upon the defendant, and concluded by praying a full answer and discovery, and that the defendant might be decreed to satisfy the judgments obtained against him, and that sufficient of his property be set apart for that purpose."

The striking similarity of these allegations to those of the

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bill under consideration cannot escape notice. The case came up on appeal from an order of the chancellor allowing exceptions to the answer. It was argued by eminent counsel, but it does not appear to have occurred to them, or to any member of the court, that the bill was demurrable, because it did not particularly set forth and describe the property which it alleged had been concealed or conveyed away in trust for the defendant under colorable title, and the discovery of which, and its appropriation in satisfaction of the complainant's judgment, was prayed for.

Mr. Justice Marcy, in delivering his judgment in this case, says: "Confining the jurisdiction of the court of chancery to the narrowest limits that have ever been assigned to it, power it certainly has, and exercises daily, of requiring answers to such allegations as the appellant in this case has wholly omitted to answer, or has answered imperfectly" (p. 623). This case was decided in December, 1829.

In *Waddell v. Storms* (*ubi sup.*), the practice in cases of creditors' bills is stated as follows: "Upon filing the bill, an injunction is taken out and served with the subpoena to answer, restraining the debtor from parting with *any* of his property or effects until the further order of the court; and, for the better protection of the property and its conversion into money, a receiver is speedily appointed, who, under the order of the court, is vested *with all such property*, or with sufficient specific portions of it, to pay the complainant's debt and costs, and all prior claims upon the same; and the debtor is compelled to assign and deliver such property to the receiver, under the direction of a master of the court."

In *Bloodgood v. Clark*, 4 Paige, 477, Chancellor Walworth says: "In these cases of creditors' bills where the return of execution unsatisfied presupposes that the property of the debtor, if any he has, will be misapplied, and entitles the complainant to an injunction in the first instance, it seems to be almost *a matter of course* to appoint a receiver to collect and preserve the property pending the litigation, and where the sworn bill of the complainant shows that he has an equitable right to all the funds and property of the defendant to satisfy his debt, and if the right of the com-

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plainant is not denied by the defendant in answer to the application for a receiver, there can be no good reason why the complaint should not have a receiver appointed to preserve the property from waste and loss. Indeed, this court has already declared that it is the duty of a complainant who has obtained an injunction upon such a bill restraining the defendant from collecting his debts or disposing of property which might be liable to waste or deterioration, to apply to the court and have a receiver appointed without any unreasonable delay. (See *Osborn v. Heyer*, 2 Paige, 343.) It is no sufficient answer to such an application to say there may not be any property to protect, as the complainant proceeds at the peril of costs if there be no property, and if there is nothing for the receiver to take, the defendant cannot be injured by the appointment."

In *Edmeston v. Lyde*, the chancellor says: "The principle being established that every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts, the powers of this court are perfectly adequate to carry that principle into full effect." (1 Paige Ch. 641, decided in 1829. See, too, 25 Barb. 663.)

The text-writers lay down the same principle *passim*. Thus Barbour says: "Upon a creditor's bill every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts, and his debts, choses in action, and other equitable rights may be assigned or sold pending the decree of the court for that purpose." (2 Barb. Ch. Pr. 152.) Under the practice of the New York courts of chancery it was held that the order of reference should authorize the master to appoint a receiver of all the property, equitable interests, things in action, and effects belonging to the debtor. * * * It should also require the defendant to assign to the receiver, under the direction of the master, *all* his property and effects." (High. on Rec., sec. 415; 1 Barb. Ch. 309-317; 1 Sandf. 723.) But a discretionary power is sometimes exercised as to the amount of the debtor's property to be assigned. (High. on Rec., sec. 429.) He was compelled, as we have seen, to assign even when he denied that he had any property. (*Bloodgood v. Clark*, *supra*.)

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Until the statute of 1 and 2 Victoria, c. 110, sec. 20, writs of execution were unknown to the English courts of chancery. (Daniell's Ch. Pl. & Pr. 1042.)

"The decrees of the court were enforced by process of contempt, and the party entitled to the benefit of the decree might obtain a writ of sequestration directing the commissioners therein named to sequester the personal property of the defendant, and the rents and profits of his real estate until he had cleared his contempt. Originally, this process was merely used as a means of coercing the defendant by keeping him out of the possession of his property; and the practice of applying the money received by the sequestrators in satisfaction of the sum decreed to be paid, is of comparatively modern origin. This, however, as we shall see in the next section, has become the usual course of procedure, and the court will now, after a sequestration has been issued to enforce a decree for the payment of the money, order the sequestrators to apply what they have received by virtue of the sequestration in satisfaction of the duty to be performed." (Daniell's Ch. Pl. & Pr. 1032-1033.)

The counsel for defendant cites no authority in support of his position, that the practice of entertaining "fishing" bills to reach assets not specifically described in the bill, and of appointing a receiver over all the property of the defendant, is entirely the creation of the New York revised statutes, and of the rules framed under it by Chancellor Walworth. The provisions referred to were introduced into the revised statutes of New York chiefly to set at rest the *questio vexata*, which had been raised by the cases of *Hadden v. Spader* and *Donavan v. Fin*, already noticed. (See Revisers' Notes, 3 R. S. 669, 2d ed.)

Authority was given to compel, in aid of an unsatisfied judgment creditor, a discovery of any property, money, or things in action, due to the debtor or held in trust for him, and to prevent the transfer of any such property, etc., and to decree satisfaction out of such property "*whether the same was originally liable to be taken in execution or not.*" The doctrine of *Hadden v. Spader* was thus explicitly recognized or adopted by legislation.

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But the powers of the court of chancery were not otherwise enlarged. It was merely authorized to do with regard to assets not originally liable to execution what, it had always been conceded, it had a right to do with regard to stocks, debts, etc., purchased by means of property *fraudulently withdrawn* from execution. The fact, therefore, that Chancellor Walworth adopted, and, until the court of chancery was abolished, maintained the rules in question, is the strongest argument to show that the practice thus established was agreeable to the general principles and methods of equity procedure.

Certainly the authority to entertain "fishing" bills to reach undescribed assets, and to appoint a receiver of all the property of the defendant, is not in terms conferred by the statute. The appointment of a receiver of all the property of the defendant is in truth, as we have seen, in the nature, not of an attachment, but of a sequestration, which by the ancient practice of the court of chancery in England, issued, as of course, upon the failure of the defendant to comply with the decree (Daniell, 1047, 1048), and the process of sequestration is still in use in England. (Daniell, 1042.) We have also seen that the court will now, where a sequestration has been ordered to enforce a decree for the payment of money, order the sequestrators to apply what they have received, by virtue of the sequestration, in satisfaction of the decree. When, therefore, the aid of equity was invoked in behalf of an unsatisfied judgment creditor, and it was settled that all his property, choses in action, debts due him, etc., could be reached, the order for the appointment of a receiver, and for the compulsory assignment to him by the defendant of all his property, was in entire accordance with the ancient usages of the court of chancery, when compelling obedience to its own decree.

The counsel for the defendant insists with much earnestness that the bill under consideration is identical with an ordinary creditor's bill, and is to be treated precisely as if brought in aid of an unsatisfied judgment at law. But in such case chancery has no jurisdiction of the original demand. It can only interpose after the demand has been

established at law, and after it has been shown by the return of an execution unsatisfied that the complainant is remediless at law. But, in the case at bar, the original suit was of equity cognizance. The decree was obtained in this court; and perhaps a writ of sequestration might have issued at once upon the failure of the defendant to comply with the decree, as it certainly could have done if the decree had been for the specific performance of some act. (Equity, Rule 8, Sup. Ct.) However this may be, no doubt can, I think, be entertained as to the power of the court to arrest and baffle the defendant, who has already been adjudged guilty of a flagrant fraud in his attempt to consummate it and secure its fruits, in avowed defiance and contempt of the court.

Says Mr. Chancellor Walworth: "Where such a fraud has been actually committed by a debtor, where he has intentionally placed or even left that property, which ought to have been devoted to the payment of his honest debts, in the hands of a third person, with a view to evade the justice of the law, and this court, by its ordinary course of proceedings, can reach such property, without doing injustice to any, it does not deserve the name of a court of equity if it has not jurisdiction to afford relief to the injured creditor." (*Wend v. Pierce*, 9 Cow. 724.)

Still less would it deserve that name if it should refuse that relief in the only form in which it can be effectual—viz., by injunction and order for a receiver—on the ground that the defendant has so far carried out his threat to secrete and make away with his property that the complainant is unable to find it or describe it in his bill.

If this court refuses to interpose until, by bill of discovery or proceedings supplementary to execution, the creditor is able to specify and describe the character of the property, it, in effect, invites the defendant to frustrate its decree, by sending the property or its proceeds out of the jurisdiction, or by conveying it to innocent, or pretended innocent purchasers, or otherwise disposing of it in such a way as to place it beyond the reach of the court.

Motion denied.

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BANK OF BRITISH NORTH AMERICA v. JAMES D. MILLER ET UX. AND JOHN T. APPERSON.

CIRCUIT COURT, DISTRICT OF OREGON.

APRIL 6, 1881.

1. **APPURTENANCE.**—A water right, granted in gross, does not become technically appurtenant to land and a mill upon and for which it is subsequently used by the grantee thereof; but where such water power is taken and applied to run a mill belonging to the owner of the power, and afterwards, while the water power is so being used, the owner conveys the premises by metes and bounds without mentioning the water right, the right may pass therewith as parcel thereof, if such appears to have been the intention of the parties.
2. **WATER POWER NOT APPURTENANT, WHEN PASSES WITH LAND.**—In 1864 a water right was granted by the owner of the basin at Oregon city in gross, and in 1866 the same was taken and applied to the use of a paper mill and machine shop on block 2 in said town; and in 1867, the same being the property of the owners of the water power, they converted it into a flour mill and applied such water power to the use thereof continuously and exclusively until 1878, when the owner of the mill and power conveyed the mill, describing the property by metes and bounds only, and without any express mention of said water right, to secure a loan of twenty thousand dollars, payable in two years, with interest at the rate of one per centum per month; the said property, including said water right, being then worth not to exceed twenty-five thousand dollars, of which sum the water right was worth one third: *Held*, that upon the facts and circumstances of the case, it satisfactorily appeared that it was the intention of the parties that the water right should pass with the land and mill, and being then used in connection therewith, it did so pass as parcel thereof.

Before DEADY, District Judge.

Ellis G. Hughes, for plaintiff.*W. Carey Johnson and William Strong*, for defendant Apperson.

DEADY, J. On April 13, 1878, James D. Miller and wife conveyed the following described property to John T. Apperson, as the executor of the will of George La Rocque, to secure the payment of the promissory note of said Miller, of the same date, for the sum of twenty thousand dollars, with interest at one per centum per month, payable to

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said Apperson or order on or before two years after date, to wit: Lots 5 and 6 in block 2 in Oregon city, Oregon, and also a portion of lots 7 and 8 in said block, constituting a parallelogram bounded on the west by the western line of said lots, and forty feet in width, and also a rectangle triangular portion of the remainder of said lot 7, situate in the south-west corner thereof, and having a west line of thirty feet and a south one of sixteen feet in length, *habendum*—"to have and to hold the said premises and appurtenances."

The mortgage also contained an agreement that Miller would keep the "buildings" on the premises insured at twenty thousand dollars, and if he failed to do so the mortgagee might foreclose or procure said insurance and tack the expense thereof to his mortgage.

On January 2, 1880, the mortgage aforesaid being in full force and only three thousand dollars interest paid thereon, said Miller and wife conveyed the lots and portions of lots aforesaid to Oliver C. Yocum, to secure the payment of the promissory note of said Miller of December 31, 1879, for the sum of eleven thousand five hundred dollars, with interest at the rate of one per centum per month, payable to said Yocum or order one day after date; and also the water right formerly conveyed to the Oregon Paper Manufacturing Company by George Marshall, John H. Moore, and Samuel L. Stevens, by deed of June 8, 1866, to wit: The perpetual right to take three hundred inches of the water which flows from the channel of the Wallamet river, east of Abernethy's island, into the basin of Daniel Harvey, on his mill reserve, on the Oregon City claim, under an average head of eight feet in said basin at low water, together with the right of way across the land of said Harvey, for a race to carry said water from the north line of said basin to the south end of Main street in said city; said right and easement being particularly described in a deed executed by said Harvey, Moore, Marshall, Stevens aforesaid, and Joseph Switzler, on August 9, 1864, which note and mortgage was, on January 3, 1880, in consideration of eleven thousand

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five hundred dollars, duly transferred to the Bank of British North America.

On April 1, 1880, the plaintiff commenced this suit upon said note and mortgage, making said Miller and wife and Apperson defendants therein, and admitting in its bill the existence and priority of the mortgage to Apperson, but claiming that such mortgage does not include the water right and easement aforesaid, and praying a sale of the premises and a distribution of the proceeds according to such admission and claim.

On June 18th the bill was taken for confessed, as against Miller and wife.

On May 3d the defendant Apperson answered, alleging that at the date of his mortgage, and long before, the defendant Miller was the owner in fee of the real property described in the mortgage, and also of the easement and water right aforesaid; that there was a grist-mill and warehouse and other tenements upon said property, used by said Miller and his grantors for the manufacture, storage, and shipment of flour, wheat, and mill offal; that at the date of said mortgage and long before, the said Miller and his grantors had annexed and made appurtenant to said lots, said easement and water right, and used the same to propel the machinery of said mill and warehouse, and that they are included in his mortgage.

On August 2d, the defendant Apperson filed a cross-bill, stating therein the facts contained in his answer, and praying for a sale of the premises, including the easement and water right, and that the proceeds be first applied to the payment of his debt and costs of suit.

The plaintiff answered the cross-bill, denying that the easement and water right were included in the defendant's mortgage. Replications to the answers to the bill and cross-bill were filed and testimony taken upon the point in issue. The case was argued and submitted upon the pleadings, evidence, and stipulation as to the facts concerning the origin and ownership of the easement and water right up to the date of the defendant's mortgage.

From this stipulation it appears that the easement and

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water right aforesaid were created and vested in Moore, Marshall, Stevens, and Switzler aforesaid by the deed of Daniel Harvey and Eloisa, his wife, dated August 9, 1864—the two fifths thereof to said Moore, and one fifth thereof to each of the other of said grantees, upon sundry conditions as to the use thereof not material to this controversy; that at the date of such conveyance said water right was in no way connected with or appurtenant to any real property owned by said grantees, or that described in the mortgages to the plaintiff or defendant Apperson; that on August 10, 1864, said grantees acquired said lot 8 as tenants in common in the same proportion as they owned the water right; that on March 8, 1865, said Moore, Marshall, Stevens, and the heirs of said Switzler, then deceased, acquired said lots 5 and 6 in the same proportion; and on June 7, 1866, the successors in interest of said Switzler conveyed to said Moore, Marshall, and Stevens the undivided one fifth of said lots 5, 6, and 8, and water right and easement; that on June 8, 1866, said Moore, Marshall, and Stevens conveyed to the Oregon City Paper Manufacturing Company said lot 5 and the undivided half of said easement and water right, reserving six feet and four inches in width along the easterly side of said lot and within the walls of the building then being built thereon, on which to construct a flume or penstock, for the purpose of conveying water for the equal use of the parties in said deed and their assigns, and also a strip of land two feet and six inches in width on either side of the northerly line of said lot 5, to be used by said parties and their assigns as a tail-race; that on March 4, 1868, said Oregon City Paper Manufacturing Company conveyed its interest as aforesaid in said lot 5 and easement and water right to A. I. Block; that on August 22, 1868, said Marshall conveyed to said Moore, the undivided one fourth of said lots 6, 7, and 8, and also the undivided one eighth of said easement and water right; that on June 26, 1869, said Stevens conveyed to said Moore the undivided one fourth of said lots 6, 7, and 8, and the undivided one eighth of said easement and water right; that on September 7, 1868, said Block conveyed said lot 5 and the undivided half

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of said easement and water power to the defendant Miller, C. P. Church, and said Marshall—one half to said Miller and one fourth to said Church and Marshall each; and on September 4, 1876, said Marshall conveyed to said Church the undivided one fourth of said lot 5, together with the tenements, hereditaments, and appurtenances, without any special mention of water rights; that on November 17, 1876, said Moore conveyed to said Miller and Church said lot 6 and the portions of said lots 7 and 8 above described, and the undivided one half of said easement and water right; and that on April 9, 1878, said Church conveyed to said Miller the undivided one half of said lots 5 and 6 and said portions of said lots 7 and 8, "together with all the mills, buildings, warehouses, water rights, and privileges, and easements thereon or appurtenant thereto."

In the conveyances of August 22, 1868, and June 26, 1869, the interest in the water right was the subject of a separate conveyance; and in all other conveyances of any interest in said water right in conjunction or simultaneous with any interest in said lots or either of them, the same was made by one instrument, containing, however, a special description thereof, except as otherwise appears from the foregoing statement.

It also appears from the evidence that at and before 1867, the water in question was conducted from the basin in an underground flume on Main and Third streets, to the lots in question, under an ordinance of the city allowing the use of such streets for such purposes, and after being used thereon, was discharged through a tail-race into the Walamet river; that said water was brought to lot 5, and about the half of it used to run a paper mill thereon, and eighteen or twenty inches more in a machine shop on said lot 6, belonging to said Moore; that in 1867 said paper mill was converted into a flour mill, and has been so used ever since; that since before 1876 all of said water power was used to run said mill and machinery, and has never been used otherwise nor elsewhere than as above stated; that at and before the date of the mortgage to Apperson the mill contained five run of stones with the necessary machinery; that

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there was upon the premises and used in connection with the mill a wharf and warehouse, and an elevator for lifting wheat from the river; that the water power is worth one third of the value of the site, the improvements thereon, and the power; that there is a large surplus of water in the basin from which this is obtained, but whether it can be purchased, and if so upon what terms, does not appear; and that the property, including the water right, was, on August 9, 1880, sold by the master of this court upon an interlocutory decree to the defendant Apperson and W. Carey Johnson for the sum of twenty-two thousand dollars.

Upon the argument the learned counsel for the plaintiff cited and commented upon many cases touching the question of what privileges, rights, and easements are or may be appurtenant to land, and will therefore pass to the grantee of the latter without being named in the conveyance thereof, and what are not so appurtenant. It is admitted that the water right in question is not "appurtenant" to the land in question, in the technical sense of that term, so that it could not exist separate and apart from it, and would pass with it, without mention or special agreement to that effect.

This water right was created and existed as a substantive and independent right, in gross, before the acquisition by the owners thereof of the lots mentioned in the mortgages. It was an easement without any fixed or limited dominant estate—whatever property it might be used with or upon being such estate for the time being. And although it has since been taken to said lots and there applied to run a mill and machinery thereon, and thereby become, so to speak, in fact appurtenant to such property, still it may be again separated therefrom and taken and applied elsewhere. The water right was granted without any restriction or limitation as to the nature or place of its use, and therefore the power may be applied as and where the circumstances will permit, and such application may be changed from time to time, both as to use and place, at the pleasure of the owner. (*Hart v. Curtis*, 7 Metc. 94; *Linthicum v. Ray*, 9 Wall. 242; *Ackroyd v. Smith*, 16 Com. Bench, 184; *De Witt v. Harvey et*

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al., 4 Gray, 487; *Garrison v. Rudd*, 19 Ill. 558; *Goodrich v. Burbank*, 12 Allen, 459.)

It is also clear, that a sale of any real property carries with it any easement or privilege which is necessary to its enjoyment, and at the time is in use thereon and therewith, as an appurtenance in fact, although not technically so at law—and this upon the presumption, more or less cogent according to the circumstances, that it was the intention of the parties to the agreement of sale that it should pass with the property to which it was then apparently subservient. (*Nicholas v. Chamberlain*, 3 Cro. 121; *Lampman v. Milks*, 21 N. Y. 510; *Whitney v. Olney*, 3 Mason, 280; *United States v. Appleton*, 1 Sumn. 500; *Thayer v. Payne*, 2 Cush. 327; *Strickler v. Todd*, 1 Serg. & R. 63; S. C., 13 Am. Dec. 649; *Coolidge v. Hager*, 43 Vt. 9; S. C., 5 Am. Rep. 256; *Sheets v. Selden*, 2 Wall. 186.)

In such a case the question is simply as to the intention of the parties, to be gathered from the terms of the conveyance, the subject-matter, and its use and situation at the time of the sale, or, as was said by Mr. Justice Story in *United States v. Appleton*, *supra*, “in the construction of grants the court ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, the state of the country, and the state of the thing granted, for the purpose of ascertaining the intention of the parties. In truth, every grant of a thing naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for.” In this case it was held that the vendees of the wings of a building were entitled, as against a prior vendee of the central part thereof, to the use of the windows and doors opening on to the front porch of the latter, not because such right was technically appurtenant thereto, but because such porch was so used at the time of the sale of the wings.

In *Sheets v. Shelden's Lessee*, *supra*, it was held, on the same principle, in the language of the syllabus, that upon the sale of a division of a canal belonging to the state of Indiana, “including its banks, margins, towpaths, side-cuts, feeders, basins, right of way, dams, water power, structures,

and all the appurtenances thereunto belonging,' certain adjoining parcels of land belonging to the grantor which were necessary to the use of the canal and water power, and were used with it at the time, but which could not be included in any of the terms above, passed by the conveyance."

In *Lampman v. Milks*, *supra*, it was held, when the owner of land across which flows a stream diverts the course of the latter, so as to relieve a portion of the tract from overflow, which he then sells, that neither he nor his grantees of the residue of the property can return the stream to its former bed to the damage of the first grantee. And in *Coolidge v. Hagar*, *supra*, it was held that the conveyance of a house and land by an ordinary warranty deed carried with it, by implication, the right which the grantor then had to water conveyed to the premises by means of an aqueduct from a distant spring.

This doctrine has been very strongly applied in the case of the grant of a mill, messuage, or house *eo nomine*. In the former case, it has been decided that the grant will carry with it a parcel of land adjoining the mill and used in connection with it, as well as that upon which it stands; and also the right to the water from a particular creek owned by the grantor, and then used to run the mill.

In *Whitney v. Olney*, *supra*, it was held, that land adjacent to and commonly used with a "mill," although not technically appurtenant thereto, passed by a devise thereof, upon the ground, that its use made it "parcel of the mill," and therefore it was presumed that it was intended to be comprehended within the term "mill," and devised by it. See also *United States v. Appleton*, *supra*, where Mr. Justice Story, in illustrating the proposition, that upon the grant of a house, it is implied from the nature of the grant, unless provision is made to the contrary, that the grantee shall possess the house in the manner and with the beneficial rights as were then in use and belonging to it, said: "It is strictly a question, what passes by the grant. Thus, if a man sells a mill, which at the time has a particular stream of water flowing to it, the right to the water passes as an appurtenance, although the grantor was, at the time of the

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grant, the owner of all the stream above and below the mill. And it will make no difference, that the mill was once another person's; and that the adverse right to use the stream had been acquired by the former owner, and might have been afterwards extinguished by unity of possession in the grantor. The law gives a reasonable intendment in all such cases to the grant; and passes with the property all those easements and privileges, which at the time belong to it, and are in use as appurtenances."

Upon these authorities, as well as the reason of the case, in my judgment, the conveyance to the defendant Apperson of the premises by metes and bounds, under the circumstances, passed the water right then owned by the grantor, Miller, and used in and upon the premises for any beneficial purpose.

It is admitted by the counsel for the plaintiff that if the conveyance to Apperson had described the premises as a "mill," the water power then used to run it would have passed with it to the grantee. But the conveyance was in fact of a mill—a mill was the actual subject of the sale and conveyance, the thing which the parties dealt with and for; and it is not apparent why the mere difference in the mode of description of the property should make any such difference in the effect or result of the conveyance.

But independent of this consideration it is apparent from the circumstances that it was the intention of the parties to mortgage the water power as well as the land and buildings thereon; because: 1. It was then in use upon the premises to run the mill and machinery then in active operation, and had never been used elsewhere, and must in the nature of things have been regarded as one property; 2. It was an apparent and continuous easement in actual use upon and for the benefit of the premises described in the mortgage, and gave them at least one third of their value and probably much more of their salableness; and, 3. Without it, the premises were not a sufficient security for the money loaned upon them.

And, therefore, although this water power is not, nor never was, technically appurtenant to this land or mill, so

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that it could not exist separately from them, and would pass by operation of law with a conveyance of them, independent of the intention of the parties, still, at the date of the defendant's mortgage it was in fact appurtenant to the premises, and might pass with a conveyance of them, although not specially mentioned or described therein, if such was the intention of the parties, of which I think there can be no doubt.

The controversy between the plaintiff and defendant concerning the right to this water is purely a legal one. The former has no claim to any superior equity or merit over the latter. It was not misled by the terms of the defendant's mortgage to give credit to any one upon the supposition that Miller still owned the water power unaffected by the mortgage to Apperson, but having an unsecured debt against Miller or Yocum or both, it took this mortgage for what might be made out of the property as against the defendant Apperson.

The decision of the court will be that the plaintiff recover of the defendant Miller the sum of eleven thousand five hundred dollars, with interest thereon from January 2, 1880, and that the defendant Apperson recover of said defendant the sum of twenty thousand dollars, with interest thereon from October 13, 1879; that the lien of the mortgage of said Apperson extends to the water power as well as the lots and improvements thereon, and that the amount due said Apperson be first paid from the proceeds of the sale of said premises, together with the legal costs and expenses incurred by him in this suit, and that the balance, if any, be applied upon the debt due the plaintiff; and that the lien of both said mortgages be held satisfied, and the purchaser of the premises take the same discharged therefrom.

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Points decided.

THE CANADA—EFFINGHAM B. SUTTON ET AL.,
CLAIMANTS.

DISTRICT COURT, DISTRICT OF OREGON.

APRIL 28, 1881.

1. STEVEDORES' SERVICES.—Upon general principles, the services of a stevedore are maritime in their character, and when performed for a foreign ship, he has a lien thereon for the value thereof.
2. FOREIGN PORT.—A vessel is in a foreign port, in the sense of the maritime law, when she is in a port without the state where she belongs and her owner resides.
3. SHIP—MORTGAGE OF.—A mortgagor of a ship in possession with the consent of the mortgagee, is thereby authorized to make any change, addition, or repair thereon necessary and convenient for her preservation and use as a ship, so that he does not wilfully depreciate her value as a security to the mortgagee; and in such case, the old material displaced by the new may be disposed of by the mortgagor as his property, unaffected by the mortgage.
4. *IDEM*.—But in case said material is not thus disposed of, and is left on board, and passes into the possession of the mortgagee with the vessel, and is capable of being used in some form in its ordinary navigation, it would still be within the operation of the mortgage, and belong to the mortgagee.
5. *IDEM*.—But if the old material, as such, is not suited for use in the navigation of the vessel, the fact that the mortgagor allows it to remain on board does not show that he did not intend to withdraw it from the operation of the mortgage and appropriate it, in exchange for the new material put in its place.
6. OLD COPPER.—While the *Canada* was in possession of George and Jabez Howes, as mortgagors, and making the voyage from New York to Portland, Oregon, she was recoppered at Rio de Janeiro, and a portion of the old copper stowed in her hold and brought to Portland, where she was taken possession of by Sutton & Co., as mortgagees: *Held*, that the old copper was separated from the ship and withdrawn from the operation of the mortgage, and was the property of the mortgagors.
7. CONSTRUCTION OF STATE STATUTE.—It does not appear that the New York court of appeals decided in 39 N. Y. 19; 43 Id. 554; 59 Id. 554; or 71 Id. 413, that so much of the act of April 24, 1862, as gives a material-man a lien upon a vessel for supplies furnished in her home port is void, because in conflict with the grant of admiralty jurisdiction to the United States; and if it did, this court is not bound to follow it, because the question as to its validity arises under the constitution of the United States, and not the state, and is therefore a federal one.
8. LIEN OF MATERIAL-MAN AND MORTGAGEE.—When the local law gives a lien for supplies furnished to a vessel in her home port, and provides that such lien shall be preferred to that of a mortgagee, a court of admiralty

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will enforce it accordingly; and such lien will be so enforced by a court of admiralty when the local law is silent on the subject, upon the grounds:

1. That a lien of a maritime contract, whether it arises under the local law or the maritime law, is practically a maritime lien and entitled to rank accordingly, and to be preferred to that of a mortgage. 2. That a mortgagor in possession is the agent of the mortgagee in obtaining supplies for the vessel, and the lien given therefor binds the interest of the latter as well as that of the former.

9. REGISTRATION OF MORTGAGE.—Section 4192 of the Revised Statutes, providing for the registration of mortgages of vessels, does not change the nature or operation of the lien of such mortgage, but only provides that without such registration it shall not be valid; and, therefore, a state law preferring the lien of a domestic material-man to that of a mortgage is not in conflict with such section.

Before DEADY, District Judge.

IN March, 1880, the ship *Canada*, of New York, owned by George and Jabez Howes of that place, sailed for this port with a cargo of railway iron, and on account of being compelled to put into Rio de Janeiro for repairs, did not reach her destination until March 4, 1881.

On March 9th, Thomas F. McNeill et al., composing the crew of the vessel, brought suit against her for their wages; and on April 2d, Effingham B. Sutton et al., constituting the firm of Sutton & Co., of New York, intervened for their interest as mortgagees in possession, to secure them against any liability they might incur by reason of having indorsed three certain notes of said Howes in March and April, 1879, for the sum of fifteen thousand four hundred and thirty-one dollars and fifteen cents, which they were afterwards compelled to pay, and petitioned that the proceeds of the vessel remaining after the payment of prior claims, and all the proceeds of nine thousand one hundred and forty pounds of old copper then on board the vessel and taken off her at Rio and there replaced by new copper, might be applied upon the debt secured by said mortgage.

On April 6, 1881, the *Canada* was sold upon an interlocutory decree for the sum of twenty-six thousand dollars, and the old copper upon a stipulation for the sum of one thousand and ninety-eight dollars and fifty cents, which was not sufficient to satisfy the claim of the mortgagee after paying two thousand eight hundred and seven-eighths dollars

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and fourteen cents due the seamen; eleven thousand eight hundred and forty-two dollars and eighty-four cents, the balance due on a bottomry bond given for the repairs at Rio de Janeiro; and claims for towage, pilotage, and labor, and materials furnished the vessel, in this port and the port of New York, that are admitted or claimed to have priority over such claim.

John H. Woodward and Charles Woodward, for the libellants *McNeill et al.*, and the claimants.

Rufus Mallory, for the libellants *Brown & McCabe*.

W. B. Gilbert, for the libellants *Cornish & Hitchcock* and *Whitlock & Stover*.

DEADY, J. The libellants *J. A. Brown* and *W. T. McCabe*, intervening for their interest, file their libel against the *Canada* to recover one thousand and seven dollars and ten cents for services and expenditures as stevedores, in unloading from said vessel a cargo of railway iron at this port, weighing one thousand five hundred and eighty-one tons, and allege therein, that the libellants were employed at this port by the master, to discharge the cargo for a compensation of sixty cents a ton, and performed said contract prior to March 21st, for which they are entitled to the sum of nine hundred and forty-eight dollars and sixty cents; that in performing said contract they expended and paid out fifty-eight dollars and fifty cents in docking said vessel and otherwise fitting her for discharge; and that there is due them for such services and expenditures the sum of one thousand and seven dollars and ten cents, which sum is a lien upon said vessel. To this libel, *Effingham B. Sutton et al.*, claimants of the vessel as mortgagees in possession—under a mortgage from the owners, *George and Jabez Howes*—except and allege that the facts stated therein do not give the libellants a lien upon the vessel.

If the case was one of first impression, I should have no hesitation in holding that the contract and service of the libellants was a maritime one, and therefore that their claim

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is privileged and a lien on the vessel. It falls exactly within the definition of such a contract as given by the late learned and accurate admiralty judge of the district of Maine: "By the general maritime law, every contract of the master, within the scope of his authority as master, binds the vessel, and gives the creditor a lien upon it for his security." (*The Paragon*, Ware, 323.)

When this service was performed for the *Canada* she was, in the sense of the maritime law, in a foreign port—that is, a port without the state where she belonged and her owner resided (*The Nestor*, 1 Sumn. 74; *The Chusan*, 2 Sto. 460; *The Sultana*, 19 How. 362), and therefore the master was authorized as the agent of the owner to employ the libellants to aid in "the delivery of the cargo," by discharging it from the hold of the vessel upon the wharf—that being the essential part of the undertaking and voyage of the ship; or, as it is appropriately characterized in Benedict's Admiralty (sec. 285), "the crowning act of maritime commerce, that for which all others labor, and to which all other acts are subordinate, and on which the right to freight depends, and which is, in fact, the great purpose and the only ultimate purpose of a ship, the delivery of the cargo." But in the cases of *The Amstel*, B. & H. 215 (1831), *The Joseph Cunnard*, Olc. 123 (1845), and *Cox v. Murray*, 1 Abb. Adm. 341 (1848), decided by Judge Betts, and the *S. G. Owens*, 1 Wall. jr. 370 (1849), decided by Mr. Justice Greer, it was held or said that the contract of a stevedore was not maritime, and therefore he had no lien upon the ship for his services.

In *The A. R. Dunlap*, 1 Low. 350 (1869), Judge Lowell followed these authorities under protest; but in *The George T. Kemp*, 2 Low. 482 (1876), he refused to follow them, and decided in favor of the stevedore's lien, substantially upon the ground that the services and contract of a stevedore concern the ship and her owner, her voyage and business, and are, therefore, clearly maritime in their nature; and, although he has no lien therefor upon a domestic vessel unless given by the local law, yet in the case of a for-

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foreign ship the general admiralty law gives a lien, as in the case of a material-man.

And in speaking of the contrary decisions and the reasons given for them, he says: "They are, first, that a stevedore works on land, or on a vessel at the wharf; and, second, that his concern is with the cargo rather than with the ship, and they liken him in this respect to the drayman who brings the cargo to the vessel.

"The notion that the maritime character of a contract for either labor or materials, or of the remedy for furnishing them independently of contract, depends upon the situation of the vessel as being upon the high seas or in a dock, reached its climax when it was held that a laborer who scraped the bottom of a foreign vessel, preparatory to her being coppered, had no lien. (*Bradley v. Bolles*, Abb. Adm. 569.) And that the ship-keeper of a domestic vessel could not sue, even in *personam*, in the admiralty. (*Gurney v. Crockett*, Abb. Adm. 490.) These decisions were made during the time, after Judge Story's death, when the supreme court seemed bent upon narrowing the jurisdiction in all directions, by decisions, some of which have been overruled and others explained to mean much less than they appeared to intend." And adds (p. 484): "It seems incredible that it ever could have been thought that the master, who, in a proper case, may charter, hypothecate, or even sell his ship, cannot bind it for the cost of stowing the cargo, which is one of the ordinary and self-evident necessities of a voyage." And he might have said the same thing as to discharging it.

In the *Windermere*, 2 Fed. Rep. 722 (1880), Judge Choate held, that the libellant had a lien for his services in removing ballast from a foreign ship, while in the port of New York, for the purpose of putting her in condition to receive cargo for a contemplated voyage. In the course of the opinion he says, that the rule which denied the maritime character of a stevedore's services in stowing or discharging cargo could only be maintained "on the doctrine of *stare decisis*, since it is now out of harmony with the accepted principles of maritime law as declared by the courts of admiralty."

The same view was taken of the matter, on principle, by Judge Benedict, in *The Circassian*, 1 Ben. 209. He says: "I confess that I have never been able to see any sound distinction between the nature of the services performed in stowing and breaking out the cargo of a ship and the services performed in its transportation. The stowage and the landing of the cargo form a necessary part of the contract of affreightment. Without the performance of this duty no freight can be earned. The safety of the ship and cargo depends in a great measure upon the care and skill displayed in the performance of this duty, and for its non-performance in a proper manner the ship is liable in the admiralty. It is a service which, when performed by the crew, as is frequently the case, is considered a maritime service, and compensated in the admiralty under the name of wages. And when not performed by the crew, it devolves upon a class as clearly identified with maritime affairs, as are the mariners, and fitted for their duty by a special and peculiar experience."

In *Insurance Co. v. Dunham*, 11 Wall. 26, the supreme court say, that as to contracts, the jurisdiction in admiralty does not depend upon the place where the contract is made, but the nature and subject-matter of it—"as, whether it was a maritime contract, having reference to maritime service or maritime transactions;" and (p. 29), whether maritime or not maritime depends not on the place where the contract was made, but on the subject-matter of the contract. If that is maritime, the contract is maritime.

In *The Emily Souder*, 17 Wall. 669, Mr. Justice Field says: "The steamer was detained at Maranhão nearly five weeks, and the moneys advanced by the libellants, it is true, were not entirely for the repairs of the vessel and the supplies needed for the voyage; they were intended and supplied in part to meet the expenses of her towage into port and of pilotage, and to pay the custom-house dues, consular fees, and charges for medical attendance upon the sailors. These various items, however, stood in the same rank with necessary repairs and supplies to the vessel, and the libel-

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lants, advancing funds for their payment, were equally entitled as security to a lien upon the vessel."

It is understood, that in England, since the passage of the 3 and 4 Vict., c. 65, sec. 6, giving or rather restoring to the court of admiralty jurisdiction of all claims for "necessaries supplied" to foreign vessels, that not only what is directly furnished to the ship, but what is reasonably proper for the promotion of the voyage, such as tonnage, and harbor dues, brokerage for procuring a charter, insurance, and stevedore's services, comes within the act, and entitles the party furnishing the same to a lien upon the vessel. (*The Kemp*, *supra*, 488; *The Windermere*, *supra*, 728.)

To the contrary is the case of *The Ilex*, 2 Woods, 229, in which Mr. Justice Bradley on the circuit decided upon the authority of *Cox v. Murray*, and *The S. G. Owens*, *supra*, that a stevedore has no lien for his services, because they are not of a maritime nature.

The supreme court has never passed upon this question directly, but the plain effect of its decision in *The Emily Souder*, *supra*, is in favor of the stevedore's lien. For certainly, the stowing and discharge of cargo as nearly concerns the fitment and business of the ship, and is as much maritime in its character, as the payment of custom-house dues or consular fees, both of which were held in that case to be necessary supplies, for which the admiralty gave a lien. Neither has it been decided in this district; and therefore I feel at liberty to follow what I conceive to be the true rule as deduced from first principles and as indicated by the later decisions of the supreme court and the district courts of New York and Massachusetts.

To my mind it is very plain that the services of a stevedore are maritime in their nature. A voyage cannot be begun or ended without the stowing or discharge of cargo. To receive and deliver the cargo is as much a part of the undertaking of the ship as its transportation from one port to another. Indeed, it is an essential part of such transportation. Freight is not due or earned until the cargo is at least placed on the wharf at the end of the ship's tackle.

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To say that the final delivery or discharge of the cargo is not a maritime service because it is or may be performed partly on shore, is simply begging the question, as it is the nature of the service, and not the place where rendered, that determines its character in this respect.

Without the services performed by the libellants the *Canada* would have been unable to accomplish the object of her voyage or to commence another one. The ship was in a foreign port, and the master without funds or credit. Standing in the place of the owner, he was under obligation to deliver the cargo of iron as he did. How was he to procure the necessary labor otherwise than upon the credit of the vessel? As it turns out, the owners are insolvent, the freight is hypothecated, the master is probably unable to pay, and, unless the ship is liable, the libellants will lose their labor, for which the ship or owners have received the value from the freighters. Under these circumstances, it would not only be an inconvenience, but a gross failure of justice, if the libellants were denied the right to recover from the vessel for the labor thus performed upon its account and credit.

In my judgment, the law and the right of this case are with the libellants, and I decline to follow the decisions to the contrary.

The exception is overruled, and there will be a decree for the libellants for the amount claimed, with legal interest from March 21st to date.

MAY 5, 1881.

DEADY, J. On and prior to the sailing of the *Canada* from New York, the Howes were indebted to the libellants, George Cornish and Rufus Hitchcock, of that place, in the sum of six hundred and sixty dollars for materials furnished and services rendered in repairing said vessel in the years 1879 and 1880.

On March 31, 1881, the libellants commenced an action in the circuit court for the county of Multnomah against said Howes for the recovery of said six hundred and sixty dollars, and upon the same day procured a writ of attach-

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ment to issue therein against the property of the defendants therein, upon which writ said old copper was duly attached. At the date of said attachment said copper was stowed in the hold of said vessel, which was in the custody of the marshal of the district upon the warrant issued upon the libel of Thomas F. McNeill et al., aforesaid, and subject thereto, in the possession of said Sutton & Co., as mortgagees, which possession was obtained after the arrival of the vessel here by means of an action of replevin commenced in the circuit court aforesaid, on March 5, 1881, in which no special mention was made of said copper. In the intervention of Sutton & Co., it is alleged that this old copper was and is included in the mortgage of the vessel, and that the same is in their possession on board the ship.

On April 6th, a stipulation was entered into between Cornish & Hitchcock and Sutton & Co., stating the facts aforesaid concerning said copper, and that a controversy existed between said parties "as to whether or not said metal is included in or is now a part of the mortgaged property, or whether it should be applied upon the claim of said Cornish & Hitchcock by virtue of their attachment;" and consenting that said copper might be sold by the marshal, and that the proceeds, less the expenses of sale, should be held subject to the claim of each party, and the right of Cornish & Hitchcock to intervene and assert their claim in this suit. Upon this stipulation an order was made for the sale of the copper, and it was sold by the marshal for one thousand and ninety-eight dollars and fifty cents.

No decided case in point has been found; but I think the question involved in the controversy may be satisfactorily answered by a careful consideration of the circumstances and purpose of the transaction, and a reference to the rules and principles which govern the rights of parties in the case of a mortgage of lands where the mortgagor remains in possession. A mortgage of land includes everything annexed to the freehold at the date thereof or that may become so annexed during the existence of the mortgage. (*Winslow v. Merchants' Ins. Co.*, 4 Metc. 310.) But a building, or growing timber, severed and removed from

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the mortgaged land of which it formed a part when the mortgage was given, is thereby withdrawn from the operation of the mortgage. By reason of such removal they cease to be a part of the realty—the pledge. (*Buckout v. Swift*, 27 Cal. 438.) The right of the mortgagor in possession to cut timber and remove fixtures and dispose of them is unlimited, unless restrained by a court of equity, upon the impression that the land will thereby be rendered an insufficient security for the debt. (*Brady v. Waldron*, 2 Johns. Ch. 148.)

When Sutton & Co. took their mortgage upon the *Canada*, but left her in the possession and use of the mortgagors, they impliedly authorized the latter to make such changes, additions, and repairs in her fitment, tackle, apparel, and furniture as might be necessary and convenient for her preservation and use as a ship; so that they did not willfully depreciate her value as a security for their debt.

In pursuance of this authority, the Howes might, as mortgagors in possession, remove from time to time every part of this vessel, including her tackle, apparel, and furniture, and replace it with new, and dispose of the old and displaced material as their property, unaffected by the mortgage. But in case the old material was not so disposed of, and was left on board and passed into the possession of Sutton & Co. when they took possession of the ship, to whom it then would belong would depend on circumstances.

In the consideration of the question, I think it may be assumed, in the case of a *bona fide* repair, particularly where old material is displaced with new of equal or greater value, that the mortgagor has a right to dispose of the old material as his own. But where no such disposition is made of it, and it is suffered to remain on board as part of the ship's material, and is capable of being used in some form in the navigation of the vessel, I think the old material would still belong to the ship—remain a part of it—and be the property of the mortgagee in possession. For instance, if the mortgagor in possession should put a new suit of sails on the vessel, and instead of disposing of the old ones, should stow them away as suitable material for mending or

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supplying a rent or lost sail, such old material would remain within the operation of the mortgage and pass to the mortgagee in possession.

Under those circumstances, the reasonable inference would be, that while the mortgagor had, for the safety and convenience of the vessel, added to the value of the security by the cost of the new sails (*Southworth v. Isham*, 3 Sandf. 448), yet he did not intend to appropriate or divert the old ones from the use of the ship or the operation of the mortgage.

Applying these suggestions to the case under consideration, it appears to me that this old copper, as soon as it was removed from the sides of the vessel and its place supplied with new, became the property of the mortgagors. Upon this conclusion, the master must have disposed of the two thousand additional pounds which he sold at Rio, as the property of the mortgagors, for two hundred and forty dollars; and he probably would have disposed of the remainder in the same way, if it had not been thought best to bring it here for a better market, which has proved the case.

No practical use has been shown, or even suggested, to which this copper could be applied in the ordinary navigation or use of the vessel, and therefore, although it was suffered to remain on board until the mortgagee took possession, there is no reason to conclude that the mortgagors did not intend to separate it from the mortgaged property—the vessel—and appropriate it to their own use in exchange for the new. Indeed, there is not a single circumstance connected with the transaction which tends to prove that the old copper was not only actually taken off from the sides of the ship, but legally separated from it and its uses, so that it was no longer a part of it. And finally the value of the security of Sutton & Co. has been enhanced, rather than diminished by the exchange, and therefore there is no particular merit in their claim.

Under these circumstances, this copper was, and is, the property of George and Jabez Howes, and therefore liable to the attachment of the libellants in their action in the state court to recover the sum due them from said Howes,

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and they thereby acquired a valid and subsisting lien thereon for the amount of their claim and the costs of their action. The marshal is directed to deliver the proceeds of its sale to the officer having the attachment from the state court.

MAY 12, 1881.

DEADY, J. On April 2, 1881, the libellants, William Whitlock et al., constituting the firm of Whitlock & Slover, of New York, intervening for their interest, filed a libel against the *Canada* to enforce a claim for supplies furnished said vessel in her home port—the city of New York—in which they allege that said supplies were furnished in January and February, 1880, at the request of the owner and upon the credit of the vessel, and were necessary to enable her to proceed upon her contemplated voyage; that the vessel left said port on her voyage on March 6th, and thereafter the libellants, in pursuance of the act of the legislature of New York of April 24, 1862, duly filed a specification of their claim and lien against said vessel, which has not been satisfied, though duly demanded.

The claimants, Effingham B. Sutton et al., except to the libel, because it appears that said supplies were furnished at the vessel's home port upon the request of the owner, and therefore the libellants have no lien therefor by the maritime law or by the law of New York, which can be enforced without the jurisdiction of that state.

Upon the argument, it was also contended by counsel for the claimants that the New York lien act had been declared unconstitutional and void by the courts of that state, and therefore the libellants could acquire no rights under it, citing *The Josephine*, 39 N. Y. 19; *Brookman v. Hamill*, 43 Id. 554; *Poole v. Kermit*, 59 Id. 554; *King v. Greenway*, 71 Id. 413. But notwithstanding some loose and ambiguous language in the opinions in these cases, implying the unconstitutionality of the act, as a whole, it is certain that nothing was decided in any of them but that so much of the act as gave persons having a lien under it a remedy in the state court by a proceeding *in rem* against the vessel, to enforce

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such liens, was void, upon the ground that the contract in such cases was maritime, and therefore exclusively of admiralty cognizance, except so far as the common law could give a remedy; and that it could not do by process *in rem*.

These decisions were made in obedience to the authority of the then recently decided cases in the supreme court of *The Moses Taylor*, 4 Wall. 411, and *The Hine*, Id. 556.

The validity of the provisions of the act giving the lien and providing for its registration and effect were not before the court or passed upon by it. And such seems to have been the opinion of the circuit court in *The John Farron* (S. D. N. Y.), in which Johnson, J., speaking of the decisions of the New York court in 39 and 43 N. Y. *supra*, says: "The state lien law was held to be unconstitutional, because it attempted to give process *in rem*, and thus was held to invade the grant of admiralty jurisdiction to the United States. The adjudication did not go beyond the validity of the proceeding *in rem*, and therefore the provision for the lien in the specified cases remains to be enforced, when the contract is maritime, in the courts of the admiralty." (14 Bl. C. C. 26.)

That is this case exactly. The contract to furnish supplies to the *Canada* was a maritime one, and the lien given by the law of New York to secure its performance, may be enforced in the admiralty as an incident or part of it wherever the vessel is found. (*De Lovio v. Boit*, 2 Mason, 474; *The Harrison*, 1 Saw. 353.)

It has been held by the supreme court that until congress legislates upon the subject, the state may provide a lien for material-men for necessities furnished to a vessel in her home port. And the lien thus created is declared to be "a right of property and not a mere matter of procedure," which may be enforced in the admiralty, under Rule 12, as a lien given by the general maritime law. (*The Lottawana*, 21 Wall. 579.)

And even conceding that the court of New York has decided this state law to be void, it does not follow that this court must be governed by such decision. It is admitted that the national courts are bound as a rule to follow the decisions of the state courts in construing its statutes or

determining their validity as compared with its organic law. But this is a case where the question of the validity of the state statute arises under the constitution and laws of the United States. The question is, therefore, a federal one, upon which the state court takes the law from the national one, and not the latter from the former.

There is no doubt, then, either upon reason or authority, that the libellants have a lien for their claim which may be enforced in this court as a right pertaining to a maritime contract by virtue of the local law.

The claimants next contend that if the libellants have a lien, it must be deferred to the lien of their mortgage, the registration of which is prior in point of time to that of the lien; and that if this should be held otherwise, still the lien of the mortgage outranks that for the supplies because it arises under a law of this forum—the law of the United States providing for the registration of the mortgage, while the other arises under the law of another and foreign forum—the state of New York.

In support of the first proposition counsel cite *Scott's case*, 1 Abb. U. S. 336; *The Kate Henchman*, 7 Biss. 238; *The Grace Greenwood*, 2 Id. 131; *The Bradish Johnson*, 3 Woods, 582; *Aldrich v. Ætna*, 8 Wall. 491; and section 4192 of the revised statutes (9 Stat. 440), which declares that no bill of sale, mortgage, hypothecation, or conveyance “of any United States vessel shall be valid against any person other than the grantor or mortgagor, his heirs and devisees and persons having actual notice thereof” unless the “same is recorded in the office of the collector of customs where such vessel is registered and enrolled;” provided, that “the lien for bottomry on any vessel * * * shall not lose its priority or be in any way affected by the provisions of this section.”

The cases cited from Bissell, Abbott, and Woods, appear to have been decided upon the assumption that the lien or operation of the mortgage is in some way created by or derived from the act of congress, and therefore it is superior to that of the material-man.

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The act has been twice before the supreme court for consideration (*White's Bank v. Smith*, 7 Wall. 646; *Aldrich v. Etna*, 8 Id. 491), and the point there decided, so far as it can be gathered from the opinions of Mr. Justice Nelson, is, that the statute having provided a uniform registration for instruments affecting the ownership of vessels, and declared them invalid with certain exceptions unless so registered, by implication it excludes all further state legislation from the subject; as that, they should be also registered or filed in the county clerk's office, and refiled at the end of a year, or that they should be void unless accompanied by possession. Beyond this, these cases do not go, and there is no warrant in them for the doctrine that the mortgage is called into existence by the act of congress, or that its lien or operation is in any way preferred or enlarged by it.

On the contrary, it existed and was used as a means of pledging or transferring the property in a vessel under and by virtue of the general law of the state, before the act of congress was passed. Since then, in addition to the formalities prescribed by the state law for its execution it must be registered in the proper collector's office, but when that is done its effect and rank as a lien still depend upon the state law. The registration under the act of congress is simply necessary to make it operative as to third persons without notice of its contents.

So far, then, as I am able to discern, there is nothing in the language or purpose of the act of congress from which it can be inferred that it was the intention to prefer the lien of the mortgagee to that of a material man or any other. As was said in this court in the *Favorite* (3 Saw. 409), "There is nothing in the language of the section (4192 B. S.) that indicates an intention to enlarge the operation of a mortgage on a vessel, or place the lien of it in any better condition with reference to other liens than it was before." And this is more evident, when we consider that the object of the statute was not to advance or prefer mortgages, but to protect the public against them, by requiring them to be registered in an appropriate and convenient place. Both the lien of the mortgage and the material-man being the

creatures of the law of New York, and that having provided that the latter shall be preferred to the former, it is in my judgment decisive of the question here. The respective rights of the parties arise under the law of New York, and by that law the court must be governed in deciding upon them.

But apart from the provision of the New York statute preferring the lien of the material-man to that of the mortgage, I think it clear upon general principles of law and right, that it is entitled to such preference. A mortgagor in possession represents the mortgagee, and in contracting debts for necessities is therefore authorized to bind his interest in the vessel for their payment so far as the law gives a lien therefor. In this respect there is an implied agency between them. Necessaries supplied the vessel through the agency of the mortgagor promote the interest of the mortgagee as well as that of the mortgagor, either by enabling the latter to navigate her and thus earn money to pay the indebtedness due the former, or to preserve her value as a security therefor.

In the following cases the lien of the material-man, though subsequent in point of time, was preferred to that of the mortgagor, either upon the authority of the local statute or the general maritime law: *The John Farron*, 14 Bl. C. C. 24; *The William T. Graves*, Id. 189; *The Hiawatha*, 5 Saw. 160; *The Island City*, 1 Low. 375; *The St. Josephs*, Browne's Adm. 202; *The Norfolk & Union*, 2 Hughes, 123; *The Favorite*, 3 Saw. 405.

In the *William T. Graves*, *supra*, the question was, whether a title acquired under the foreclosure of a mortgage on a vessel is subject to a lien for repairs put upon her subsequently to the date of the mortgage, and Johnson, C. J., in affirming the decision of Wallace, J., that it is, said of section 4192, revised statutes, and the proviso thereto, concerning the lien of bottomry: "The obvious purpose of this proviso was to make it entirely clear that a bottomry bond did not come within the statute requiring certain instruments to be recorded. It might otherwise have been contended that it was, in some sense, a hypothecation of the

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vessel, and, therefore, required to be recorded. It will be observed that the proviso is confined to liens by bottomry. If this proviso be construed to mean that such a lien is only out of the purview of the statute, and that all other liens are postponed to that of a mortgagee, then the claims of salvors, and all those having other strictly maritime liens, would be thus postponed, to the subversion of the whole principle upon which efficacy is given to such claims, and the overthrow of the best settled and most salutary principles of the maritime law. Indeed, any principle upon which this statute can be expounded to give such priority to a recorded mortgage, would also extend to bills of sale and other conveyances recorded under the same law, and thus practically overthrow the whole scheme of the maritime law, upon the subject of maritime liens. This statute, I conclude, therefore, has no relation to the question involved; and the lien of the libellant is left to stand upon the statute of New York, which the courts of the United States do enforce in the courts of admiralty."

In conclusion, this is a controversy between two parties claiming liens upon the vessel under the law of New York which declares that the lien of the material-man shall be preferred, and therefore it is entitled to be first satisfied out of the proceeds; and, also, that the lien of the material-man, although given by the local law, is given to secure the performance of a maritime contract, and is practically a maritime lien, and should therefore take rank with it, and be preferred to a mortgage. (*The William T. Graves, supra*, 192; *The General Burnside*, 3 Fed. Rep. 232.)

The claim of the libellant must be first paid in full, with interest and costs, and the remainder of the proceeds, one hundred and sixty-eight dollars and sixty-three cents, delivered to the claimant.

Statement of Facts.

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CALIFORNIA ARTIFICIAL STONE PAVING Co. v.
MOLITOR. SAME v. PERINE.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MAY 7, 1881.

1. **MODE OF MAKING PAVEMENT—INFRINGEMENT.**—The method adopted by the defendants in laying artificial stone pavements was as follows: They first laid down a section of cement and coarse gravel mixed, as wide as the blocks were wanted, and tamped it down solid. When partially set, these sections were cut into blocks of proper length with a trowel, the trowel cutting to a greater or less depth, according to the character of the material. Into the open joint thus made with the trowel, was floated or rubbed, some of the same material of which the block was composed. Then a top layer of finer material, containing a larger proportion of cement, was laid on the lower section, pressed down and smoothed over. The trowel was then passed along the top layer, cutting partially or wholly through it directly over the cutting below. The joint thus made in the upper layer was then smoothed over, and a joint-marker, having a tongue from a sixteenth to an eighth of an inch in depth, was run over the line of the cuttings marking off the joints: *Held*, 1. That artificial stone pavements constructed in the mode described, as used by the defendants, are infringements of the Schillinger patent; 2. That the patentee is entitled to all the benefits which result from his invention, whether he has specified them all in his patent or not; 3. That the respondents having so constructed their pavements as to gain the advantages secured by the Schillinger patent, and by substantially the same means, they are infringers of the patent.

Before SAWYER, Circuit Judge.

These are suits in equity to enjoin the infringement of a patent for improvements in concrete pavements issued to John J. Schillinger. Original letters patent No. 105,599, dated July 9, 1870. Re-issue No. 4364, dated May 2, 1871. The specifications and claim annexed to the patent, and upon which it was issued, are as follows:

Be it known that I, John J. Schillinger, of the city, county, and state of New York, have invented a new and useful Improvement in Concrete Pavements; and I do hereby declare the following to be a full, clear, and exact description thereof, which will enable those skilled in the art to make and use the same, reference being had to the accompanying drawing forming part of this specification, in which drawing—

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Figure 1 represents a plan of my pavement.

Figure 2 is a vertical section of the same.

Similar letters indicate corresponding parts.

This invention relates to a concrete pavement, which is laid in sections, so that each section can be taken up and relaid without disturbing the adjoining sections.

With the joints of this sectional concrete pavement are combined strips of tar-paper or equivalent material arranged between the several blocks or sections in such a manner as to produce a suitable tight joint and yet allow the blocks to be raised separately without affecting the blocks adjacent thereto.

In carrying out my invention I form the concrete by mixing cement with sand and gravel, or other suitable material, to form a plastic compound, using about the following proportions:

One part, by measure, of cement; one part, by measure, of sand; and from three to six parts, by measure, of gravel, with sufficient water to render the mixture plastic; but I do not confine myself to any definite proportions or materials for making the concrete composition.

While the mass is plastic, I lay or spread the same on the foundation or bed of the pavement, either in molds or between movable joists of the proper thickness, so as to form the edges of the concrete blocks *a a*, one block being formed after the other.

When the first block has set I remove the joists or partitions between it and the block next to be formed, and then I form the second block, and so on, each succeeding block being formed after the adjacent blocks have set; [and since the concrete in setting shrinks, the second block, when set, does not adhere to the first, and so on;] and when the pavement is completed each block can be taken up independent of the adjoining blocks.

Between the joints of the adjacent blocks are placed strips *b* of tar-paper, or other suitable material, in the following manner:

After completing one block, *a*, I place the tar-paper *b* along the edge where the next block is to be formed, and I put the plastic composition for such next block up against the tar-paper joint, and proceed with the formation of the new block until it is completed. In this manner I proceed until the pavement is completed, interposing tar-paper between the several joints, as described.

The paper constitutes a tight waterproof joint, but it allows the several blocks to heave separately from the effects

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of frost, or to be raised or removed separately, whenever occasion may arise, without injury to the adjacent blocks.

The paper, when placed against the block first formed, does not adhere thereto, and therefore the joints are always free between the several blocks, although the paper may adhere to the edges of the block or blocks formed after the same has been set up in its place between the joints.

[In such cases, however, where cheapness is an object, the tar-paper may be omitted, and the blocks formed without interposing anything between their joints, as previously described.]

In this latter case the joints soon fill up with sand or dust, and the pavement is rendered sufficiently tight for many purposes, while the blocks are detached from each other, and can be taken up and relaid each independent of the adjoining blocks.]

What I claim as new, and desire to secure by letters patent, is—

1. A concrete pavement laid in detached blocks or sections, substantially in the manner shown and described.

2. The arrangement of tar-paper or its equivalent between adjoining blocks of concrete, substantially as and for the purpose set forth.

Those passages in the specifications inclosed in brackets, were subsequently disclaimed by the patentee in due form.

Wheaton & Scrivner, for complainants.

C. H. Parker, J. M. Shafter, and E. N. Duprey, for defendants.

SAWYER, Circuit Judge. In this suit is involved the construction of the patent issued to John J. Schillinger, for an improvement in concrete pavements. This patent has been before me on several occasions, and I have had considerable difficulty in giving it a satisfactory construction. Previous to coming before me it was at various times before Judge Blatchford, and Judge Shipman, each of whom had occasion to construe the patent, and both gave it a construction wider in its scope than I, on first examination, thought it would bear. On further consideration of the patent, and of their views upon the point, I am not prepared to say with confidence that their construction is not correct.

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Judge Blatchford is undoubtedly an able jurist, and the same may be said of Judge Shipman. The decisions of Judges Blatchford and Shipman are looked upon by the supreme court with great respect; and it is probable that those two judges have tried more patent cases than any other two judges in the United States now living. I have, therefore, felt very great diffidence in dissenting from them in the construction of a patent.

On former trials of cases involving the rights of the complainant under this patent, I gave it a more limited construction than that adopted by the distinguished judges mentioned. They do not hold it necessary, that, during the process of formation of the pavement constructed under the Schillinger pavement, there should be interposed between the blocks anything which should permanently remain. In the previous cases before me, I instructed the jury that, for the purpose of determining the question of infringement in those cases, there *should be* something, either tar-paper or its equivalent, permanently interposed between the joints. Under the construction given to the patent by Judge Blatchford, and also by Judge Shipman, there can be no doubt but that this patent has been infringed by the respondents in both the case of *The California Artificial Stone Paving Company v. Perine*, and the case of *The California Artificial Stone Paving Company v. Molitor*; and I think, after full consideration, that, even under the more limited construction which I have heretofore adopted, the respondents in both these cases have infringed.

There is some conflict in the testimony as to how these pavements were constructed by the respondents in both these cases—as to whether or not there was any cutting at all at the joints during the process of formation; and particularly in the *Molitor case*, it is claimed that no cutting whatever was done by the respondent. I have gone over the testimony on that subject carefully, and I am satisfied that, in both cases, there was cutting at the joints by means of a trowel during the process of formation. The testimony of Molitor, in his case, it is true, is directly to the contrary, yet his testimony is somewhat impeached, and I am

disposed to think that it should be taken with some grains of allowance. I think, by a careful study of the testimony of Schalike, alone, who is Molitor's foreman and one of his principal witnesses, it is apparent that they did do cutting with the trowel. He superintended the construction of the pavement which was laid in alleged infringement of the complainant's patent, and he admits that there was cutting. Although he once or twice states that there was no use of the trowel for cutting, yet, under cross-examination, being pressed by complainant's counsel, he says he cannot tell whether it was cut through or not; cannot tell how deep he cut; is at a loss to tell what was done in that regard. Still, taking his whole testimony together, it is manifest therefrom that he did cut with a trowel.

There are some other witnesses, it is true, whose testimony goes to support that of Molitor; but, on the other hand, the complainant's witnesses positively and distinctly contradict them. Several of these witnesses of complainant appear to be men of intelligence, capable of observing, some of them having had experience in the same business; and they all visited the place where the respondent's pavement was being laid, expressly to observe the manner in which the work was done, and examined it under such circumstances as would be likely to impress upon their minds the respondent's mode of operation and construction. They would not be likely to be mistaken, and if they misstate the facts they must be willfully at fault; and they all testify distinctly that there *was* cutting in the joints during the process of formation. From the testimony of these witnesses and of Schalike, and from an examination of the stones which were taken up from the respondent's pavements, referred to and presented in evidence, I am satisfied that there was such cutting in the Molitor pavement, as well as in that laid by Perine.

The process of laying the pavements in question is substantially this: One section having been formed, a scantling or mold is laid down parallel with the edge of the completed section, and at a distance of the desired width of the blocks, and the bottom course of coarser material is

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put in, to the depth of about three inches, and tamped down solid, its thickness being reduced by the tamping about half an inch. That course being allowed to partially set, a trowel is afterwards used to cut out the blocks into the proper lengths, the cutting with the trowel being to a greater or less depth according to the character of the material along the line of the cut, in some portions the cut being, doubtless, through the concrete; while in other portions, where stones are encountered in the gravel so large as to interfere with the trowel, the incision may be of less or even little depth. This makes a joint in the partially set material so tamped solid; and into the open joint thus made, when the concrete has partially set, is floated or rubbed in some of the same material of which the block is composed. Then the top layer or surface, composed of finer material and containing more cement, is laid on, pressed down and smoothed over. The trowel is then run through on the same line of the joints, directly over the cutting below, and probably, as a general proposition, passes through the top layer, although I am not certain whether or not that is always the case. Parting-strips are used by Molitor, but their purpose is simply to keep the different colors on adjoining blocks from blending. After the top or surface layer is cut with the trowel, the cuts or joints are again smoothed or floated over, and a joint-marker (the tongue of which is testified by some of the witnesses to be one sixteenth of an inch in depth, and by others to be one eighth of an inch in depth) is run over the line of the joints, marking off the block. The block is thus finished.

This Schillinger patent is evidently a valuable patent. Schillinger was the first man who ever made pavements of this character. Immediately after its discovery it went rapidly into very general use; and other parties began to infringe. The first infringers, as Judge Blatchford states, cut joints and filled them in with pitch, or asphaltum. In the specification of the Schillinger patent the inventor sets forth: "With the joints of this sectional concrete pavement are combined strips of tar-paper or equivalent material, ar-

ranged between the several blocks or sections in such a manner as to produce a suitable tight joint, and allow the blocks to be raised separately without affecting the blocks adjacent thereto." By Judge Blatchford it was held, that the pitch or asphaltum which was filled into the cuts along the joints effected the same purpose as, and was the equivalent of, the tar-paper.

Infringers then tried various ingenious methods of evading the patent. The next course adopted was the filling of the cuts or joints by pouring in cement, which is one of the component parts of the material of which the pavement is formed, in the same way that the pitch or asphaltum had been used. This was held to be an equivalent of the tar-paper, and an infringement.

Then it was held, that it was not necessary that there should be any material *permanently* interposed in the cuts or joints, but that if the joints were made during the process of formation by inserting the trowel or other instrument, cutting a joint substantially as was done in this case, then the complainant's patent was infringed. It is something very like the infringements just described that the respondents in these cases have been doing—filling in the cuts with concrete composed of cement and fine gravel in equal parts, instead of with pitch, asphaltum, or cement.

In the laying of this pavement by these respondents, the first course of coarser material being tamped down solid and allowed to partially set, is then in a solid condition; is compact; and when the trowel is run through, it makes an open joint to the extent to which it cuts. Instead of pouring pitch, tar, asphaltum or cement into the open joint thus made, the respondent, in each of these cases, simply takes an instrument called a float, and smooths over and floats into the cut the material on the top which has partially set, and which is composed partly of cement and partly of gravel—that is to say, the same material partially set of which the layer of the block is composed. This material does not connect the adjoining blocks so perfectly as cement would, because the cement would bind them together more strongly; and this composite material is not

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tamped in, but goes in loosely; and the material in the joint is, therefore, in a very different condition from the like material which is tamped down in the body of the blocks. It is floated loosely into the joint when the material of the block has partially set, so that it is in a different state of consistency, not likely to attach itself firmly to and be solid with the adjoining material in the blocks. The material in the joint, therefore, is not homogeneous with the material composing the blocks; its structure is different; it is less compact; looser in its texture; it is less adhesive; it is less permanent; it has entered the opening in a different state of consistency; it is different in its chemical structure, the material having partially set; it is matter interposed in the joint made in the process of formation; and I do not see why it does not answer the purpose of cement, or asphaltum, or pitch, or of the tar-paper. There is an open joint made by the trowel in the process of formation, and it is filled by the substance interposed, which does not adhere so firmly but that the pavement is much weaker along the line of the joint than in any other place. Although this interposed substance may in some degree adhere to the edges of the adjoining blocks, the respondents get, to some extent, at least, the benefit referred to, and the further benefit of controlling the cracking from contraction of the concrete composing the pavement.

One of the great objections to the solid concrete pavements made before Schillinger's invention was, that it cracked irregularly; and one of the chief advantages of his invention, as shown by the testimony in these cases, is, that the openings resulting from shrinkage come along the line of the joints, and the blocks themselves do not crack, although that advantage is not set forth in the patent. In the pavements constructed by the respondents this result has been attained; and it has been admitted by the respondents in one case in this court, in which this Schillinger patent has been in question, that the object of running the trowel through at the joints was to so weaken the pavement along these lines as to control the cracking, and leave the blocks as marked off unbroken. This is clearly an infringement,

for the patentee is entitled to all the benefits which result from his invention, whether he has specified all the benefits in his patent or not. So in heaving from frost, and in taking up the pavement, the breakage would be likely to be along the same line.

The conclusion at which I have arrived from an examination of all the evidence in these cases is, then, that in the pavements laid by the respondents in each of these cases there are open joints made between the blocks during the process of formation, into which is interposed material which remains there permanently; and the view that I take of it is, that that material is, in some degree, the equivalent of the tar-paper, and gives, to some considerable extent, at least, the advantages of the Schillinger invention.

In my judgment, based upon the testimony and my own observation of the specimens of blocks exhibited in the case, the respondents' pavements thus made are not equal to the Schillinger pavement; but, then, the respondents make pavements which are practical pavements, in which the cracking resulting from shrinkage is controlled by the joints made in the process of formation, and in which, to some extent, the blocks can be removed without injury to the adjoining blocks, although not so completely as in the case of the Schillinger pavement. The respondents construct practical pavements, which can be made cheaper than those made under the Schillinger patent, having to some extent the same advantages, obtained by substantially the same means, and, therefore, come in competition with the complainant, and to a considerable extent supersede his patented pavement. Therefore, even under the construction which I have heretofore given to this patent, although narrower than that which has been given to it by the eminent judges whom I have named, I think these pavements, laid by both Perine and Molitor, are infringements upon the Schillinger patent.

There may be some advantage in the bevelled joints claimed to be used by Molitor; but if so, his pavement still embraces the Schillinger invention, if my view is correct, and he is, therefore, an infringer.

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In the Molitor pavement, a portion of which was taken up, and some of the blocks introduced as exhibits, the thickness of the upper course of fine material is not more than half an inch, and that contains, substantially, nearly all the strength of the block, for the lower course of material in these specimens is of such an inferior character, that it can be crumbled to pieces by rubbing with the fingers. Yet even this is weakened by the cutting of joints with a trowel, as before described. If, then, the lower course is of such a crumbling character, either on account of not containing a sufficient quantity of cement, or because of not being properly tamped, and there is no cutting of the joints in that upper course with the trowel, the mere marking of that top layer to the extent to which the marker goes in would probably control the cracking. If the tongue of the marker will cut the upper layer to a depth of one eighth, or even one sixteenth of an inch, then, the entire thickness of that upper layer being but half an inch, it is probable that that incision would be sufficient to control the cracking of that upper layer; and as that layer is the most substantial part of the block, that marking might, and probably would, be sufficient to control the cracking of the entire block.

In my view, therefore, the respondents in these two cases, Perine and Molitor, have both so constructed their pavements as to gain the advantages secured to the complainant by the Schillinger patent, and by substantially the same means; and they are, therefore, infringers of that patent.

In both these cases the preliminary injunctions heretofore issued will be continued in force, and a decree entered for complainant in accordance with the views expressed.

THE GLENEARNE—P. F. H. HASTIE, CLAIMANT.

DISTRICT COURT, DISTRICT OF OREGON.

MAY 7, 1881.

1. PILOTAGE ON THE COLUMBIA AND WALLAMET RIVERS.—By the laws of Oregon, the waters of the Columbia and Wallamet rivers are a pilot ground, upon which a licensed pilot is entitled to so much per foot draft of the vessel piloted, for his services, without reference to the distance they may be required; and if such pilot first offers his services to a sea-going vessel upon such waters and is refused, he is entitled to recover half-pilotage; the *Glennearne*, a sea-going vessel of six hundred tons burden, and sixteen and a half feet draft, being at Astoria, in charge of a Washington Territory pilot, licensed for the Columbia river only, and bound on a voyage to Portland, was spoken by an Oregon pilot, who offered his services to conduct her to Portland, which offer was refused: *Held*, that the vessel might take either pilot while on the Columbia river, but as only the Oregon one was entitled to pilot her on the Wallamet river, his offer was a valid tender, so far, of pilot service, upon the refusal of which the vessel became liable to him for half-pilotage.
2. HALF-PILOTAGE.—Where the pilot law provides that an offer of pilot service, if refused, shall entitle the pilot to half-pilotage, such offer and refusal, in law, create an obligation or contract to pay such half-pilotage, which may be enforced in the admiralty against the owner or vessel.

Before DEADY, District Judge.

Erasmus D. Shattuck, for libellant.*John W. Whalley and Rufus Mullory*, for defendant.

DEADY, J. Philip Johnson brings this suit against the bark *Glennearne*, a foreign vessel of six hundred tons burden and sixteen and one half feet draft, to enforce the payment of thirty-three dollars alleged to be due him as half-pilotage under the pilot laws of Oregon relating to pilots and pilotage on the Columbia and Wallamet rivers, between Astoria and the head of navigation, upon the ground, as he alleges in his libel, that on March 2, 1881, he was a duly licensed pilot under the laws and upon the waters aforesaid, when said vessel was lying at Astoria, bound on a voyage to Portland without having a pilot authorized to make such voyage on board or having been spoken by such an one, and the libellant then and there offered his services as such pilot to the

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master of said vessel, to pilot her to Portland, which offer was not accepted but refused.

The answer of the master and claimant, P. F. H. Hastie, admits the allegations of the libel, except the one, that he was without a pilot when the libellant tendered his services; and alleges that the bark was then under charge of Albert Betts, a duly licensed pilot for the waters of the Columbia river, under the pilot law of Washington Territory, approved November 9, 1871, who thereafter piloted said vessel to the mouth of the Wallamet river, from whence she proceeded to Portland with said Betts on board.

The answer is excepted to for insufficiency instead of irrelevancy, but the exceptions were argued as if taken for the latter cause, and will be so considered.

In equity or admiralty an exception for insufficiency does not question or challenge the materiality or relevancy of the answer as a defence, but only its fullness or explicitness as a response to the bill or libel. If the answer or any article of it is sufficient as a response but not a defence to the libel, the exception, which is then equivalent to a demurrer at law, should be taken for irrelevancy or impertinence. (*The California*, 1 Saw. 465; S. C., Adm. R. 30; Ben. Adm., secs. 466-471.)

The pilot laws of Oregon provide that the waters of the Columbia river below Astoria shall constitute a pilotage ground for which pilots shall be licensed by a board of commissioners, who shall receive such compensation for their services thereon as the law prescribes; and that the waters of the Columbia and Wallamet rivers "from Astoria to the head of navigation" shall constitute another pilot ground for which pilots shall be licensed by the same authority and receive "fees for the same amount of pilotage" as the bar pilots. (Or. Laws, sec. 7, p. 706.) Under this provision it is understood that the commissioners have prescribed the fees of river pilots in proportion to the compensation allowed by law to bar pilots, which, in the case of *The Glenearne* are admitted to be four dollars per foot draft for full pilotage.

A vessel is not absolutely required to take a pilot on

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either ground, but in the case of an offer and refusal of pilotage, the vessel, when bound in to Astoria, is liable for full pilotage, and when bound out one half. (Or. Laws, sec. 16, p. 708); and the river pilot "who shall first speak any sea-going vessel ascending or descending the river above Astoria, shall, whether such vessel want such pilot or not, be entitled to half-pilotage fees." (Or. Laws, sec. 12, p. 707); provided, such vessel is then not under tow. (Id. sec. 27, p. 710.)

Claims for pilotage are cases of admiralty jurisdiction and they may be enforced either against the owner or the vessel. An offer and refusal of pilotage services under the law giving half fees therefor create an obligation or contract upon the part of the owner to pay the same, which may be enforced in admiralty against him or the vessel. (Ben. Adm., secs. 289-391; *The Wright*, 1 Deady, 597; *The California*, 1 Saw. 467; *Steamship Co. v. Joliffe*, 2 Wall. 457; *Ex parte McNiel*, 13 Id. 242.)

The right to regulate pilots and pilotage on the navigable waters of the United States belongs to congress, as a part of the power to regulate commerce. But it has been held that until congress exercises such power the subject may be regulated by the several states; and upon that impression, it was declared by congress, in section 4 of the act of August 7, 1879 (1 Stat. 54; sec. 4235 R. S.), that until further provision was made by it, the subject should be regulated by the laws of the states. By the act of March 2, 1837 (5 Stat. 153; sec. 4236 R. S.), congress provided that a vessel upon waters that are the boundary between two states may take a pilot from either. (*Gibbons v. Ogden*, 9 Wheat. 207; *Cooley v. Board of Wardens*, 12 How. 316; *Ex parte McNiel*, 13 Wall. 236; *The Panama*, 1 Deady, 31.)

Therefore, when the *Glenearne* was at Astoria bound up the Columbia river, she was on pilotage ground, subject to the laws of both Oregon and Washington, and might, so far, take a pilot from either, after declining the services of one from the other, without becoming liable for half-pilotage to the latter. And so far as the navigation of the Columbia river is concerned, this is a sufficient answer to the

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libellant's claim, independent of the fact that the Washington Territory pilot first offered his services.

But the *Glennearne* was then bound on a voyage to Portland, which involved the navigation of the Wallamet river for a distance of twelve miles. Upon this portion of the pilotage ground between Astoria and Portland this act of congress does not apply, and the Washington Territory pilot was not qualified to act.

It follows, that when the libellant offered his services to the *Glennearne* to conduct her over his pilotage ground, to wit, from Astoria to Portland—practically the head of navigation on the Wallamet river for sea-going vessels—there was no pilot on board to take charge from the mouth of such river to Portland, and so much of the voyage was actually made without a licensed pilot. If the libellant had offered his services at the mouth of the Wallamet river to pilot the vessel to Portland, there is no doubt that he would have been entitled to take charge, and, if refused, to claim half-pilotage, and this is practically admitted.

But the pilotage ground between Astoria and Portland is not divided into parts or sections, and the compensation for pilot services upon or over it is not so much per mile, or in proportion to the distance navigated, but so much a foot—according to the draft of the vessel—be the distance more or less.

When the libellant offered his services to the master of the *Glennearne* at Astoria he was on his pilotage ground, and thereby he became entitled to pilot the vessel, at least from the mouth of the Wallamet to Portland, or to receive half-pilotage—two dollars a foot—therefor, if his offer was declined.

The master was not bound to take the Washington Territory pilot, although he was the first to speak the vessel, but might, in any case, do so, if he chose, as far as the mouth of the Wallamet, for which service he would be entitled to pilotage according to the law of the territory. But, notwithstanding, he was bound to take the Oregon pilot over that portion of the voyage or pilotage ground within the limits of the state of Oregon, or pay him half-pilotage, on

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account of the offer and refusal. Between Astoria and Portland the Columbia and Wallamet rivers are a pilotage ground for the Oregon river pilots, but the pilotage ground of the Washington pilots stops at the mouth of the latter. By the employment of an Oregon pilot at Astoria the voyage between the two places may be made with one pilot and for one pilotage. But if the master chooses to incur the expense of double pilotage, he may employ a Washington pilot from Astoria to the mouth of the Wallamet, and an Oregon pilot from thence to Portland. But he can not evade the offer, or its effect, of the Oregon pilot to conduct his vessel over any part of his pilot ground within the exclusive jurisdiction of his state by employing a Washington pilot on the Columbia river to conduct him to the Wallamet and from there accompany him to Portland.

The libellant is entitled to recover the amount claimed, with legal interest and costs.

The libel of James Strang against this vessel for a similar cause was heard with the preceding one. The suit is brought to enforce the payment of thirty-three dollars, alleged to be due the libellant as half-pilotage upon an offer to pilot the *Glenearne*, on March 23, 1881, from Portland to Astoria, and a refusal to accept the same.

The offer was made on the return trip of the vessel to Astoria, and was declined, for the reason given in *Philip Johnson's case*—that she was then in charge of Albert Betts, a Washington Territory pilot, who had been employed at Astoria to conduct her the round voyage on the Columbia river.

But this did not prevent the libellant from making a valid and effective tender of his services for the navigation of the Wallamet river, at least. The vessel was on the libellant's pilotage ground, and not in the charge of a qualified pilot. The libellant was qualified to pilot her to Astoria, and entitled to do so to the Columbia river, or to receive half-pilotage for the offer and refusal of his services in this respect.

There must be a decree for the libellant for the sum claimed, and interest and costs.

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A. S. McWILLIAMS v. J. R. WITHINGTON.

CIRCUIT COURT, DISTRICT OF NEVADA.

MAY 9, 1881.

1. **TIME PURCHASE FROM STATE—SALE—EXECUTION.**—The interest which a person has under a time purchase from the state, while the contract remains in force, is property subject to levy and sale upon execution.
2. **SAME—RIGHT OF PURCHASER.**—The purchaser at such sale has a right to make the annual payments and perfect the title.
3. **SAME—DUTY OF MORTGAGOR.**—In the absence of any false representations as to the extent of his interest or contract at the date of the mortgage under which the property is sold, it is not the duty of the mortgagor to perfect the title by making the annual payments.
4. **SAME—FAILURE OF TITLE.**—The proper remedy of a purchaser at execution sale is by motion in the same suit, in case of total failure of title.
5. **SAME—SAME.**—Section 1300 of the compiled laws of Nevada is a rule of decision by which this court must be governed.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

Kirkpatrick & Stephens, for plaintiff.

Robert M. Clarke, for defendant.

By the Court, HILLYER, District Judge. This is a motion to vacate the satisfaction of judgment entered herein, set aside the sale, and remit the judgment to the extent of four thousand dollars.

It is based upon a petition, and, by agreement of counsel, has been submitted upon the petition and the answer thereto.

The petition presented a case of total failure of title, and a demurrer to it was overruled.

The answer makes the following case, which is agreed to as true.

The property was sold by the marshal September 3, 1879, and at that time Withington, the defendant, had entered into a time contract with the state of Nevada under section 3820 of the compiled laws for its purchase, and had made at least one annual payment. The contract was still in force. McWilliams bought the property for four thousand

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dollars, and on receipt of two thousand dollars in addition, entered satisfaction of the whole judgment on October 9, 1879, and in March, 1880, received the marshal's deed.

On November 17, 1879, no annual payment having been made by either McWilliams or Withington, the state, as it had a right to do under the law, sold the lands to other parties and issued patents about December 16, 1879, so that at the date of the marshal's deed Withington had no interest in the property.

The petitioner avers that he has been unable to obtain possession "by reason of the fact that said Withington had no title or interest therein or thereto, and the same was not subject to sale as the property of said Withington."

The interest which a person has under a time purchase from the state while the contract remains in force is, in my judgment, property subject to sale upon execution.

It is such an interest as the supreme court of Nevada describe in *Barnes v. Sabron*, 10 Nev. 240, as follows: "To this land he (plaintiff) has the beneficial estate or interest, as well as the possession, and as such equitable owner and actual possessor is entitled to enjoy all the incidents to the land (a water right) and its ownership, as well as the land itself."

And in *Page v. Rogers*, 31 Cal. 306, it was held that both before and after the time for redemption had expired, the purchaser at an execution sale had an equitable estate which could be seized and sold on execution. (See *People v. Shearer*, 30 Cal. 648 and cases cited; *Witherspoon v. Duncan*, 4 Wall. 219.)

Lands in the new states have always been held to be taxable by the state before they are patented, if they have been purchased from the United States; "and, indeed," says Mr. Justice McLean, in delivering the opinion of the supreme court in *Carrol v. Safford*, "in Ohio under the credit system, lands were taxed after the expiration of five years from the time of their purchase, although they had not been paid for in full." (3 How. 459. See also *People v. Shearer*, 30 Cal. 648, and cases cited; *Witherspoon v.*

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Duncan, 4 Wall. 219; *Hughes v. U. S.*, Id. 232; *U. M. & M. Co. v. Danberg*, 2 Saw. 455.)

At the date of this sale by the marshal, Withington had entered into a contract with the state of Nevada for the purchase of this land, the price was agreed upon, and he had paid a portion of the purchase money and was to pay the rest in annual instalments, and to have a deed upon making the last payment. He had the actual possession, and was in receipt of every benefit which would have come to him from full ownership. That he had a valuable interest in the land it needs no argument to prove. He or his successor in interest was the only man in the world, so long as he kept the contract in force, who had a right to make the payments and preserve his interest. To the extent of his payments already made he had a pecuniary interest which would increase each year until the contract was performed and the patent delivered. At the close and after he had fully paid for the land but had not received his patent, he would still have but the equitable title, but it would be such an equitable title as virtually to constitute him the owner. The difference between his position then and before, while his contract remained in force, was in degree only. He had purchased the land and had agreed to pay the price in instalments. So long as he lived up to his agreement he was entitled to the possession and the whole beneficial ownership. (*Barnes v. Sabron*, *supra*.)

If Withington had a vendible interest at the date of the sale, as I think clear, and there was no fraud, and we cannot, in the absence of proof, presume any, the whole matter is narrowed down to this question, whether it was the duty of Withington to continue to make payments to the state after the sale? and if not, did the right to do so pass by the sale to the plaintiff McWilliams?

In the absence of any misrepresentation on the part of the defendant, as to the extent of his interest at the date of the mortgage, I cannot see upon what principle he would be bound to go on with his annual payments. So long as the property remained his under the contract, it would be of interest to him to pay the instalments as they fell due,

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but after the property was sold the case would be different. I do not see that he would be any more bound to continue the payments than in case he had assigned his interest in the contract voluntarily. And clearly in that case it would take a new personal contract on his part at the time to enable his assignee to compel him to make the payments. McWilliams purchased at the execution sale his interest in the land, which included the right to compel the payments himself, and thus perfect the title. He succeeded to the interest of Withington, and nothing more. The right of McWilliams, the purchaser at the marshal's sale, to go on and carry out the contract with the state, seems to follow as a necessary deduction from the finding that the interest of Withington was subject to sale under execution. Where there had been a sale of land under execution, by a mistaken description of which land the debtor, Bouse, was, and for a long time had been, in possession, it was held, that the purchaser had an equity, which could be enforced by proper proceedings, and that whenever a party is in such a situation as to be entitled to call for a specific performance, he then has such an interest as may be transferred by execution sale, "and as a matter of course," says the court, "when the law once annexes to the debtor's interest in land the incident of transferability, it must manifestly follow, that the purchaser will immediately succeed to and occupy the *status* of him whose estate the sheriff's deed purports to convey; otherwise the statute respecting execution sales would be utterly inoperative so far as regards equitable interest in land." (*Morgan v. Bouse*, 53 Mo. 219.)

In *Hodges v. Saunders*, 17 Pick. 470, it was held, that the benefit of an agreement made by the defendant, in the nature of a covenant for further assurance, passed with the estate to the purchaser. The sale was an official sale by an administrator, for the payment of debts, and the estate passed solely by force of the statute, and not by reason of any interest the grantor (administrator) personally had in it. An assignee under a sheriff's sale is the assignee of the original party; as much so as if the latter had assigned to

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him directly. (*McCrady* ads. *Brisbane*, 1 Nott & M. 104; *Redwine v. Brown*, 10 Ga. 311.)

In *White v. Whitney*, 3 Metc. 81, it was held, that the purchaser at sheriff's sale of the equity of redemption of a mortgaged estate buys the whole estate, subject to the mortgage, and a covenant that the premises are free from incumbrances passes to him. For the breach of this covenant he may have an action. "It was," says the court, "a covenant incident to the estate, made for its security and protection, beneficial to the person to whom the estate should come, but to no other. It was part of the debtor's right, title, and interest in the premises." The legal effect and operation of the sheriff's deed was to transfer this covenant to the purchaser.

Where the covenant runs with the land, it is immaterial whether it pass by deed from the grantee or by a sheriff's deed. The grantee in the sheriff's deed is as much the assignee of such a covenant as though the conveyance was made by the covenantor himself. (*Carter v. Ex'r of Denman*, 3 Zab. 271.)

It seems to me there is a clear analogy between the case at bar and these just cited. In *Page v. Rogers*, *supra*, at page 306, in illustrating the similarity between a voluntary vendor for cash with a covenant to convey in six months and a defeasance back, and an involuntary sale of a debtor's interest in land with a right to redeem, the court said, "In the case of the voluntary vendor as well as of the judgment debtor, other parties, by purchasing his interest under executions or upon voluntary sales, could acquire his interest and defeat the estate of the vendee, by performing the conditions as well as in the case of redemptioners under execution sales."

Thus, whenever it is determined that a debtor has an interest in land which is subject to seizure and sale under execution, then the marshal's certificate of sale transfers the whole of that interest to the purchaser, of whatsoever nature, legal or equitable, it may be. If equitable, the purchaser acquires a right to do those things which are necessary to preserve the estate. In this case McWilliams pur-

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THE GLENEARNE—P. F. H. HASTIE, CLAIMANT.

DISTRICT COURT, DISTRICT OF OREGON.

MAY 7, 1881.

1. PILOTAGE ON THE COLUMBIA AND WALLAMET RIVERS.—By the laws of Oregon, the waters of the Columbia and Wallamet rivers are a pilot ground, upon which a licensed pilot is entitled to so much per foot draft of the vessel piloted, for his services, without reference to the distance they may be required; and if such pilot first offers his services to a sea-going vessel upon such waters and is refused, he is entitled to recover half-pilotage; the *Glennearne*, a sea-going vessel of six hundred tons burden, and sixteen and a half feet draft, being at Astoria, in charge of a Washington Territory pilot, licensed for the Columbia river only, and bound on a voyage to Portland, was spoken by an Oregon pilot, who offered his services to conduct her to Portland, which offer was refused: *Held*, that the vessel might take either pilot while on the Columbia river, but as only the Oregon one was entitled to pilot her on the Wallamet river, his offer was a valid tender, so far, of pilot service, upon the refusal of which the vessel became liable to him for half-pilotage.
2. HALF-PILOTAGE.—Where the pilot law provides that an offer of pilot service, if refused, shall entitle the pilot to half-pilotage, such offer and refusal, in law, create an obligation or contract to pay such half-pilotage, which may be enforced in the admiralty against the owner or vessel.

Before DEADY, District Judge.

Erasmus D. Shattuck, for libellant.*John W. Whalley and Rufus Mullory*, for defendant.

DEADY, J. Philip Johnson brings this suit against the bark *Glennearne*, a foreign vessel of six hundred tons burden and sixteen and one half feet draft, to enforce the payment of thirty-three dollars alleged to be due him as half-pilotage under the pilot laws of Oregon relating to pilots and pilotage on the Columbia and Wallamet rivers, between Astoria and the head of navigation, upon the ground, as he alleges in his libel, that on March 2, 1881, he was a duly licensed pilot under the laws and upon the waters aforesaid, when said vessel was lying at Astoria, bound on a voyage to Portland without having a pilot authorized to make such voyage on board or having been spoken by such an one, and the libellant then and there offered his services as such pilot to the

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master of said vessel, to pilot her to Portland, which offer was not accepted but refused.

The answer of the master and claimant, P. F. H. Hastie, admits the allegations of the libel, except the one, that he was without a pilot when the libellant tendered his services; and alleges that the bark was then under charge of Albert Betts, a duly licensed pilot for the waters of the Columbia river, under the pilot law of Washington Territory, approved November 9, 1871, who thereafter piloted said vessel to the mouth of the Wallamet river, from whence she proceeded to Portland with said Betts on board.

The answer is excepted to for insufficiency instead of irrelevancy, but the exceptions were argued as if taken for the latter cause, and will be so considered.

In equity or admiralty an exception for insufficiency does not question or challenge the materiality or relevancy of the answer as a defence, but only its fullness or explicitness as a response to the bill or libel. If the answer or any article of it is sufficient as a response but not a defence to the libel, the exception, which is then equivalent to a demurrer at law, should be taken for irrelevancy or impertinence. (*The California*, 1 Saw. 465; S. C., Adm. R. 30; Ben. Adm., secs. 466-471.)

The pilot laws of Oregon provide that the waters of the Columbia river below Astoria shall constitute a pilotage ground for which pilots shall be licensed by a board of commissioners, who shall receive such compensation for their services thereon as the law prescribes; and that the waters of the Columbia and Wallamet rivers "from Astoria to the head of navigation" shall constitute another pilot ground for which pilots shall be licensed by the same authority and receive "fees for the same amount of pilotage" as the bar pilots. (Or. Laws, sec. 7, p. 706.) Under this provision it is understood that the commissioners have prescribed the fees of river pilots in proportion to the compensation allowed by law to bar pilots, which, in the case of *The Glenearne* are admitted to be four dollars per foot draft for full pilotage.

A vessel is not absolutely required to take a pilot on

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Before DEADY, District Judge.

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the mischief sought to be remedied by the act of October 24, 1864, *supra*, and if it is held to be a citizen of Massachusetts, it must be so regarded.

But admitting this, I do not think the local statute should be construed so as to prevent a foreign corporation from maintaining a suit in the state court, and it is very clear that the state can not prevent such corporation from maintaining a suit in this court.

Upon the showing in the bill the plaintiff is entitled to sue in this or the state court.

As these contracts were made in 1877, the act of October 21, 1880 (Ses. L., p. 6), entitled "An act to establish and protect the rights of married women," which is supposed to have altogether relieved the wife from the "disabilities" or protection, as the case may be, of coverture, does not affect this case.

By marriage, at common law, the property of the wife became that of the husband—the personalty absolutely, and the realty during the marriage. But in time, the doctrine was established in equity that the wife could hold property to her separate use and benefit, and this has, in effect, become the fundamental law of this state. (Or. Con., art. XV, sec. 5.)

With the capacity to acquire and hold property to her separate use, she was allowed to have the power to dispose of the same, as if she were unmarried, unless the instrument or means whereby she acquired the title provided otherwise. (*Yale v. Dederer*, 18 N. Y. 265.)

Out of this general power of disposition naturally grew the lesser one—the power to charge her separate estate with a specific debt or engagement for her own benefit or that of another.

In this way the disability of coverture, as to her separate property, was practically removed, but her contracts were still invalid, except so far as they might affect such property, and she is not liable upon them personally, either at law or in equity.

Whether a wife has charged her separate estate with a debt or engagement in a particular case, is a question of

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evidence, it being the generally conceded rule that if the same will inure to the benefit of herself or her separate estate, that she is presumed to have intended to so charge it.

But where this is not the effect of the transaction, but the debt or engagement is incurred or made for the benefit of another, the authorities are in conflict as to the necessary evidence to establish her intention to charge her separate estate therewith.

By the English and a majority of the American authorities, it is held that if a wife contract in writing, so as to satisfy the statute of frauds, to pay a sum of money, either as principal or surety, for her own benefit or that of another, it is sufficient evidence of her intention to charge her separate estate, and will create a charge thereon that may be enforced in a court of equity. (Bish. Law of M. W., sec. 870; *Bull v. Kellar*, 13 B. Mon. 381; *Deering v. Boyle*, 8 Kan. 525; *Todd v. Lee*, 15 Wis. 401; *The M. B. of St. Louis v. Taylor*, 62 Mo. 338; *Williams v. Winston*, 9 Rep. 418, S. C. of Ohio, 1880.)

But, in other states, and notably in New York, it is held that the debt or engagement of the wife, the consideration for which does not inure to the benefit of her separate estate, does not create a charge upon said estate, unless her intention to do so is declared in the very contract which is the foundation of the charge. (*Yale v. Dederer*, 18 N. Y. 265; S. C., 22 Id. 450; S. C., 68 Id. 324; *Manhattan B. & M. Co. v. Thompson*, 58 Id. 80; *The C. E. Ins. Co. v. Babcock*, 42 Id. 614.)

The supreme court of this state has not passed upon the question.

It is obvious that the rule established in New York by the decision in *Yale v. Dederer*, *supra*, is a departure from the current of authorities on this subject; but as an original and correct exposition of the elementary principles of law applicable to the question, it commends itself to my judgment.

Whoever takes the signature of a married woman to an obligation, given for the benefit of her husband or another, knowing that such signature is void as to her personally,

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but expecting to rely upon her separate estate for its fulfilment, ought to have her declaration therein, to the effect that she signs the instrument with such intention and understanding.

But even upon this view of the law, I do not see how the stipulation in these notes can be otherwise construed than as manifesting the intent and purpose of the wife to charge her separate estate with the payment thereof. It may be admitted that the representation therein, that the obligation was given for her benefit, is false, and that she is not estopped to show it. (Big. Estop. 276, 485.)

It may also be admitted that the stipulation would have been more explicit and in better form if it had stated that the wife gave the obligation with the intention to charge her separate estate therewith, rather than that the payee took it "on the credit" of said estate. But considered as it is, there can be no doubt about its meaning and the intention of the parties thereto. It is expressed that the payee took the obligation "on the credit of the separate estate" of the wife, and if she, knowing this fact and signing the instrument with this declaration in it, really intended otherwise, as she avers, then she contemplated a fraud which she cannot be heard to allege against the plain import of her own agreement to the contrary.

There is no set form of words necessary to manifest the wife's intention to create the charge upon her estate. It is sufficient if it fairly appears from the language used, under the circumstances, that such was her intention. She gave this obligation to pay her husband's debt with the express understanding that it was accepted by the creditor upon the credit of her separate estate, and the only inference from this fact, compatible with her honesty, is, that she so intended it.

This undertaking may have been an unwise one on her part. But where the law gives the wife the power to contract, as a *feme-sole*, it will hold her to a like obligation to perform, regardless of the consequences to herself or her estate.

The demurrer is sustained.

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SLAVONIAN MINING CO. v. SAMUEL VACAVICH ET AL.

CIRCUIT COURT, DISTRICT OF NEVADA.

MAY 16, 1881.

1. MINING LAW—THE AMENDMENT OF JANUARY 22, 1880, TO SECTION 2324 OF THE REVISED STATUTES, does not act retrospectively, so as to save a claim from a forfeiture incurred before its passage.
2. SAME—RELOCATION.—There cannot be any relocation before the period within which work is required has expired, which can be made valid by a failure to work on the part of the original owners.
3. SAME—RESUMPTION OF WORK.—There must be a *bona fide* attempt, at least, to resume. Threats a long distance from the claim, without any act towards carrying them out, are not a sufficient excuse for non-performance.
4. SAME.—*Held*, also, that if the relocators had entered and were in actual possession after a forfeiture, although they had not relocated, the original locators would have no right to make a forcible entry for the purpose of resuming work.

Before HILLYER, District Judge.

THE facts are stated in the opinion.

George E. Hurpham, for plaintiff.*Walter H. Tompkins and A. C. Ellis*, for defendants.

HILLYER, J. This is an action to recover a mining claim in Columbus mining district, Nevada. A jury has been waived by written stipulation.

It is submitted to the court mainly upon an agreed statement of facts—the only disputed facts being in regard to the plaintiff's excuse for not doing work in 1880, after the claim was forfeited under the mining laws of the United States.

It is agreed that no work was in fact done on the claim by the plaintiff after October, 1878. The claim was originally located January 3, 1876. January 22, 1880, congress amended the mining law by adding the following words to section 2324 of the revised statutes: "*Provided*, that the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such

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claim, and this section shall apply to all claims located since the tenth day of May, *anno Domini* eighteen hundred and seventy-two." It was argued that this proviso gave the plaintiff the whole of the year 1880 in which to do work, although none had been done in 1879.

The object of this proviso was to make one uniform period for the annual work on all claims located since May 10, 1872, and fixed the first of January next succeeding the date of location as the time of its commencement. A claim located, as this was, January 3, 1876, would not require any labor to be done on it, under this proviso, before December 31, 1877. Before the proviso, work had to be done by January 2, 1877. But in this case no question is made as to the work being done up to January 3, 1880. The last work, done in October, 1878, held the claim until January 3, 1879. As the law then stood, work was required before January 3, 1880, and not having been done, the claim was forfeited, unless work was resumed, as the law provided.

The law of January 22, 1880, did not, in my judgment, act retrospectively, and its first application to the plaintiff's claim would have been January 1, 1881. Claims located prior to May 10, 1872, had already been provided for, by extending the time for the annual expenditure thereon to January 1, 1875. (18 Stat. 61.) By applying the law of January 22, 1880, to all claims located since May 10, 1872, all cases were provided for and a rule for all annual expenditures established uniform with the calendar year.

This is the view of the general land office, and is undoubtedly correct. (Sickels' Mining Laws and Decisions, 1881, pp. 392, 393.)

Thus there was no forfeiture of the plaintiff's claim until January 3, 1880. In September, 1879, the defendant, Samuel Vacavich, relocated this claim. This, it is admitted, was a premature location, but it is claimed by the defendants to have been validated after January 3, 1880, by the failure to do the annual work, on the part of plaintiff. But this, in my judgment, is a wrong view.

Vacavich, before January 3, 1880, was a trespasser, and could not lay the foundation of any valid claim to this mine

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before that date. Until then, the plaintiff was not in default, and its ground was not subject to relocation for the failure to do the annual work. It would never do to permit an entry upon a mining claim, before the owner of it was in default, for the purpose of making a provisional location, to be valid or worthless according as the owner failed or not to do the annual work subsequently. The Vacavich location was a mere nullity.

On March 19, 1880, Mr. Koencke, president of the plaintiff, by authority of the company, went to Candelaria to do the annual work, and it is admitted that at this time the claim was forfeited and subject to relocation, and that unless what was done by Mr. Koencke in March, and by Mr. Harpham in June following, amounted to a resumption of work on the claim, there can be no recovery.

The provision of section 2324 of the revised statutes, is, that "the claim, or mine, upon which such failure [to work] occurred shall be open to relocation *in the same manner as if no location of the same had ever been made*; provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

Mr. Koencke testifies that he visited the mine March 19, 1880, and that it is situated about a mile from the town of Candelaria. About half way between the mine and Candelaria he met Thomas Perasich, one of the defendants, and told him he was going to do the annual work on the mine; that Perasich then told him that he was the sole owner of the mine, and could not permit any one to work on it; that he would shoot any one who attempted to work; and that he did not do any work on the mine, because he was threatened with shooting.

It does not appear that Perasich did in fact offer any violence, or that he prevented Mr. Koencke from going on to the mine. Mr. Koencke states further, that he did go on out to the mine, and finding a padlock on the door of the tunnel, abandoned the idea of work.

Mr. Harpham testified that he was sent down by the board of directors in June, 1880, as agent and attorney at law; that

before going to Candelaria he stopped in Carson and commenced this suit, taking the summons along, to be served in case he was not allowed to do the annual work on the mine for the year; that on his arrival at Candelaria he made inquiries touching the locality of the mine, and went out to it, or in its vicinity. He says, on cross-examination, he does not know whether he was on the claim, or within a quarter of a mile of it, but saw the mouth of the tunnel closed up. He further testifies, that without attempting to do any work, although in no way molested, he next sought the defendants, and sought permission of Thomas Perasich to work, before trying to do any; that he found Thomas Perasich at the Tilden mine, some ten or twelve miles from Candelaria, and at that distance from the mine, told him he had come down to do the annual work for the year; that Perasich then told him that the mine was his, and he was in possession, and would blow the top of anybody's head off who tried to do work on the claim for plaintiff; that the deputy marshal was with him, and upon this he had him serve the summons. He also testifies, that from what he heard about Candelaria, he did not think it would be safe to try to work.

This is a favorable statement of the evidence for the plaintiff. Both Perasich and Gregovich deny that any threats were made, and Perasich denies that there was any padlock on the tunnel door. There is also some conflict as to what occurred at the Tilden mine. Perasich denies that he said he was in possession, and denies that he was in fact in possession at the time this suit was commenced.

But let us assume that the statements of Mr. Koenek and Mr. Harpham are absolutely correct, and it does not follow that what they did amounts to a resumption of work as the law requires.

Neither states that there was any offer of violence, even at that distance from the mine. No weapon of any kind was shown, and there was no demonstration by any act, so far as the testimony shows, calculated to alarm, beyond these naked threats, made in one instance half a mile, and in the other, seven to twelve miles from the ground in con-

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troversy. Moreover, it appears, by the testimony of both, that they went to the mine during their stay at Candelaria, and were altogether unmolested. Why no attempt was made to work at these times does not appear. Words, unaccompanied by any overt act, showing a present intention of carrying them into effect, even on the ground, would hardly justify the plaintiff in declining to make some effort to work. But unless the threats were made on the ground, or so near as to amount to the same thing, they certainly ought not to have that effect. The threats made to Mr. Koeneke by one of the defendants, half a mile from the mine, do not seem to have had a very serious effect on Mr. Koeneke or the other directors, for they still thought in June that the work might be done. Mr. Harpham says he was to try to do the work, and only serve the papers in case he was not allowed to do it; and that he had a considerable sum of money with him—one hundred dollars or so—with which to carry out that purpose. Harpham was not in any way molested when he visited the mine. He made no attempt to work, but sought Perasich at the Tilden mine, seven to twelve miles away, to obtain his permission. I have no doubt that at this time, if Harpham, instead of seeking for Perasich, had made a real effort to perform the labor which the law requires, he would have succeeded. But whether he would or not, it certainly seems to me to have been his duty to try. Yet, although not molested by any one, he is not sure that he got on the claim while he was in Candelaria.

At this time the plaintiff might have resumed work and complied with the law if it were done peaceably. It had no need to ask permission of any one. Either its old claim was good or it had none. It might enter by virtue of its old location so long as the ground remained unappropriated. Whenever there has been such force as excuses from performance, it has been on the ground. I have not been referred by counsel to any authorities on this point. In *Robinson v. Imperial Silver M. Co.*, 5 Nev. 44, De Groot, while engaged in fencing his land under a law which required him to fence within one year, was forcibly stopped by Black

and Eastman, and himself and employees driven from the premises. And in *Alford v. Dewin*, 1 Nev. 207-214, the defendants had entered, and the plaintiffs, being wrongfully ousted, could not fence. I will not say that there may not be threats on the ground unaccompanied by acts, of so serious and menacing a character as to satisfy a man of ordinary prudence it would be unsafe to begin work, and in such case it might be an excuse for non-performance. But that is not this case.

Had Harpham, instead of visiting Perasich at the Tilden mine, gone to plaintiff's mine and begun work, at the worst he would have had to leave when ordered off. There is not the least probability that he would have been injured in his person if he had been willing to do this without resistance. I have no doubt, from the testimony, that had Harpham at this time commenced work on the claim resolutely, the defendants would never have interfered with him. At all events, I find that his fears of personal violence had no sufficient foundation and did not justify him in declining to make an effort. It follows that the claim was open to relocation on the twenty-seventh day of September, 1880, when, according to the agreed statement of facts, it was relocated by the defendant, Thomas Perasich.

Another view of this case is this: The complaint alleges an ouster, on the twenty-fifth day of November, 1879, by the defendants. Now, it would have been sufficient to have shown such an ouster, and if continued, as alleged, to the time of bringing this suit, it would have been unnecessary to show that work had been performed by the plaintiff so long as the defendants withheld the possession. Because, in November, 1879, there had been no forfeiture. The plaintiff, then, should have stood upon proof of these facts, if they could have been established. But I presume that it had no sufficient proof of them; for it was distinctly admitted, as has been before stated, that unless work was done after January 3, 1879, or such an attempt to work as amounted to the same thing, the claim had been forfeited.

The ouster, admitting one to have been proved, was in June, the proof consisting of an alleged statement by

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Thomas Perasich, seven miles from the claim, that he was in possession. But the plaintiff sought to establish a possession in defendants, and claims that it did so. It was obliged to show possession in the defendants at the time of bringing this suit, or fail in it.

Upon its own theory, that the defendants were in possession, claiming the ground, I do not see how it can justify an entry upon the possession of another, who, by the terms of the law, has the same right to relocate the claim that the plaintiff or its grantors had to locate it originally. The language of the law is, that after a failure to work, and it is conceded there was a failure in this case, the claim shall be "open to relocation in the same manner as if no location of the same had ever been made," with a proviso that the original locators have not resumed work after failure and before such location.

Did congress contemplate anything besides a peaceable entry and resumption of work, upon an entry by the relocators? I think not. Congress never could have meant to enact a law which would encourage breaches of the peace, as this would if the original locators might resume work at any time before a formal relocation by those who had entered, after forfeiture, for the purpose of relocation. The relocater, after entry for the purpose of locating, would be in the same predicament as the original locator was when he took possession in the first instance, and would have precisely the same rights. The same right to hold the ground against trespassers, upon the basis of his *possessio pedis*, without complying with the local rules and customs, or indeed with the law of congress. (*Atherton v. Fowler*, 96 U. S. 513.)

So that after a forfeiture incurred, the original locator, it seems to me, cannot put himself in a position to maintain ejectment, except by actually resuming work before an entry by a person seeking to relocate for the forfeiture, and an ouster by such person. For clearly the defendants in this case, finding no one on the ground, had a right to take possession after January 3, 1880. After that date, and before resuming work, there could be no ouster of the plaintiff.

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Nor would the plaintiff, after the forfeiture incurred, be justified in making entry on this mining ground while in the possession of another. The threats of Perasich were, therefore, upon the theory of plaintiff that he was in possession, nothing wrong, if this view is right.

Let judgment be entered for defendants for costs.

TIMOTHY ROACH, ADM'R, v. CONSOLIDATED IMPERIAL MINING COMPANY.

CIRCUIT COURT, DISTRICT OF NEVADA.

JUNE 6, 1881.

1. STATUTE CONSTRUED—DEATH BY WRONGFUL ACT—KINDRED—PLEADING.

It is not indispensable that a complaint, drawn to recover damages for death by wrongful act, under the statute of Nevada, should set forth that there are kindred named in the act. There may be a recovery without it.

2. SAME.—But if proof is to be given of injury to kindred, the facts must be averred.

3. SAME.—Under that statute, it is immaterial whether the death of the person injured is immediate or consequential.

Before HILLYER, District Judge.

DEMURRER to complaint.

Lindsey & Dickson, for plaintiff.

B. C. Whitman, for defendant.

HILLYER, J. This action is brought under a statute of Nevada, requiring compensation for causing death by wrongful act, neglect, or default. The objections taken are:

1. That the complaint is ambiguous and uncertain; 2. That there is no allegation that the plaintiff's intestate left kindred named in the statute; and, 3. That it is alleged that the injury caused the immediate death of the person injured, and there can be no recovery.

In regard to the first point, there certainly seems to be some ambiguity in the averments concerning the distance the cage fell in the shaft. The shaft is alleged to be two

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thousand eight hundred feet deep. The cable is alleged to have broken at the one thousand one hundred foot level, while the cage was ascending with the plaintiff's intestate from the one thousand three hundred foot level, and to have fallen down the shaft, "to wit, more than three hundred feet." From the one thousand one hundred foot level to the bottom of the shaft is one thousand seven hundred feet. The complaint does not show what it was that arrested the cage if it did not go to the bottom of the shaft, nor anything which explains the averment, "to wit, more than three hundred feet." If there is anything in the case making the distance the cage fell material, it ought to be made plainer, so that the defendant can meet it. If not, the ambiguity can be removed by striking out the words above quoted. All that seems material to aver is that the fall of the cage caused the death.

The two remaining points are based upon the language of the statute of Nevada, section 115, Comp. Laws, p. 39, entitled, "An act requiring compensation for causing death by wrongful acts, neglect, or default."

"Sec. 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the persons who or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; and although the death shall have been caused under such circumstances as amount in law to a felony.

"Sec. 2. The proceeds of any judgment obtained in any action brought under the provisions of this act shall not be liable for any debt of the deceased; provided he or she shall have left a husband, wife, child, father, mother, brother, sister, or child or children of a deceased child; but shall be distributed as follows: * * * if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of

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deceased persons; provided every such action shall be brought by and in the name of the personal representative, or representatives, of such deceased person; and provided, further, the jury in every such action may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into consideration the pecuniary injury resulting from such death to the kindred as herein named."

Under this statute there are two causes of action—two grounds upon which a recovery can be had: one for the injury to the deceased, and one for the injury to the kindred named in the act. In the first case, the jury may give such damages, pecuniary and exemplary, as they shall deem fair and just; and in the second, may take into consideration the pecuniary injury to the kindred named in the act. The use of the words "pecuniary and exemplary" in the first clause of the proviso, and of the word "pecuniary" in the last, is significant, and shows that the legislature had both causes of action in view. Otherwise the last clause would serve no purpose.

The statute of Nevada is different from any which has come under my observation in this particular, and it is evident that the draughtsman had in his mind certain expressions to be found in some of the cases, and intended to meet them by giving a right of action to the personal representative, in which the rule of damages should be the same as it would have been if the deceased had lived and brought it; and in addition, to permit the jury to consider the pecuniary loss to the kindred. This is further manifest from the fact that if there are none of the kindred named in the act, there may still be a recovery and the amount will become general assets.

It is evident that in those states in which the statute was construed to limit the measure of damages to the pecuniary loss of kindred, making that the only basis of a recovery, there was no escape from requiring an allegation that kindred were left, and the amount of damage suffered by them.

"We consider, upon the whole," say the court, in *Safford v. Drew*, 3 Duer, 640, "that the only ground upon which the action can rest, is the ground upon which the damages

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are to be recovered; that the prescription of the one ground or rule of damage has excluded every other, and thus rendered it indispensable, in order to support a suit under the statute that pecuniary loss has resulted to the widow and next of kin." This same construction applied to the statute before me would, so far as the kindred named in the act are concerned, limit the recovery to the pecuniary injury they had sustained. But is it not evident that this would be saying that an added incident was the principal and only thing?

In my judgment, the New York court could never have used the language quoted, if it had been construing the statute of Nevada. It could never have said that the pecuniary loss to the wife and next of kin constituted the sole cause of action—the sole ground upon which the jury could base a verdict.

What I have said indicates the result reached upon this point.

Whatever the jury "may take into consideration" must be stated in the complaint, for there cannot, properly, be any proof or any deliberation by the jury upon a cause of action not stated. It is not, however, in my opinion, indispensable to the plaintiff's complaint that it should state, as a ground of recovery, the pecuniary injury to the kindred. The complaint, as it stands, is sufficient, in that it contains, in this particular, allegations touching the injury to the deceased upon which the plaintiff can recover.

But if it is a fact that there are kindred of the degrees named in the act, and that they have sustained some pecuniary injury by the death, and if the plaintiff proposes to offer proof of those facts, they must be alleged.

The argument upon the part of the plaintiff, however, seems to have proceeded upon the theory, that because the amount of any recovery might become general assets under the statute, proof might be given of these facts without an averment to support it. This, I think, cannot be done without violating the old and just principle, that the allegations and the proof must correspond.

Upon this point I have consulted, *Blake v. The Midland*

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Ry. Co., 10 Law & Eq. 437; *The City of Chicago v. Major*, 18 Ill. 349; *Chicago & Rock Island R. R. Co. v. Morris*, 26 Id. 400; *Conant et al. v. Griffin*, 48 Id. 410; *Railroad Co. v. Miller*, 2 Col. 465; *Safford v. Drew*, 3 Duer, 627; 9 & 10 Vict. c. 93, p. 693; Statutes of California, 1862, p. 447; St. Ind. 1862, sec. 584; Code Iowa, secs. 2525, 2526; Comp. Laws Mich. p. 1881 (1872); Rev. St. of Ky., vol. 1, p. 223.

The more important point remains to be considered. It is alleged in the complaint that death was the immediate result of the injury received.

The argument is, that when death is the immediate or instantaneous result of an injury, there is no space of time for a right of action to accrue to the injured party, and that none can therefore survive to the personal representative. On the other hand, it is contended, that this statute gives, and was intended to give, a new right of action, and does not continue any old right which the injured person had. The argument in support of the demurrer assumes that the action which the personal representative brings is the same—to be measured by the same rule of damages as if the deceased had commenced an action and had died during its continuance. It also assumes that there is such a thing as instantaneous death resulting from an injury to the person.

The only case cited to sustain the point is *Kearney v. Railroad Co.*, 9 Cush. 108. That case was decided upon a statute of Massachusetts passed in 1842, as follows: "The action of trespass on the case for damage to the person, shall hereafter survive, so that in the event of the death of any person entitled to bring such action or liable thereto, the same may be prosecuted or defended by or against his executor or administrator in the same manner as if he were living."

And the construction placed upon this act was that "the case contemplated by the statute must be of such a nature that the party injured must himself have, at some time, had a cause of action," and because the injured person was said to be instantly killed, the court said he never had a cause of action to survive.

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But under the Nevada statute, it is not indispensable to show that the person killed lived long enough to have a right of action accrue, admitting the Massachusetts case to be sound.

All that is necessary is that the wrongful act shall be such as would (if death had not ensued) have entitled the party injured to sue. The statute acts on the wrong-doer, making him liable for damages, "notwithstanding the death of the person injured." The action is given to the personal representative for the purpose, in part, of compensating the kindred named in the act, which is a wholly new and distinct ground from that which the injured party would have had, and cannot be said in any sense to survive.

The English statute, upon which the statute now being construed is drawn, is 9 and 10 Vict., c. 93, p. 693, passed in 1846, four years after the Massachusetts statute. In *Blake v. Railway Company*, *supra*, the court of queen's bench, in fixing a measure of damages, refused to allow anything beyond the pecuniary loss to the family of the deceased, saying, in answer to the argument, that the party injured, if he had recovered, would have been entitled to a *solatium*, and therefore his representative shall be so on his death, "it will be evident that this act does not transfer this right of action to his representative, but gives to the representative a totally new right of action, on different principles." So in New York, construing a statute passed in 1847, and framed upon this English statute, in the case of *Safford v. Drew*, *supra*, the court said: "The statute, it is not to be contested, creates a new action." The title of the English act is, "An act for compensating the families of persons killed by accidents," and that of New York, Illinois, California, Michigan, and Nevada, is, "An act requiring compensation for causing death by wrongful act (in this state, acts), neglect, or default." The first section of all is identical with the first section of the English act, after the preamble, with one immaterial exception. And it has been uniformly held that these statutes created a new right, and introduced a new element of damages, the new right being the right to sue for damages for an act which caused death,

and the new principle of damage being the pecuniary loss to the kindred resulting therefrom. See the cases cited above.

If the wrongful act is one for which the deceased, had he lived, would have had a right of action, then the person doing the act is liable to an action by the personal representative; in the language of the act, "notwithstanding the death of the person injured."

If the intention had been to give the right of action, with some limitation in respect to the time within which death must result, the legislature would have so expressed it. But the main object being to secure compensation to the kindred, it, as justly observed by counsel, was as much required in the case of a sudden as of a lingering death, when the death is the immediate as when it is not the immediate result of the injuries. I cannot discover, in the language of the act, any intention to limit the recovery to the one case rather than the other. The right of action appears to me to be given in such language as renders it immaterial whether death was the immediate result of the injury, or whether time intervened. The case in 9 Cushing is not an authority here. The statute of Massachusetts, as construed by the court of that state, was passed to keep alive a cause of action which the party dying had at the time of his death—that of Nevada, to give a new right of action, in which one measure of damages should be the pecuniary loss to the kindred.

Upon the language of the code of Tennessee, which is not so clear as that of the statute of this state, it has been held, that the fact that death was instantaneous was not material. (*Railroad Co. v. Price*, 2 Heisk. 580.) This case was made stronger by the holding afterwards, that the action under the code "was for the same cause as it would have been had the action been brought by the injured party in his lifetime. (*Fowles v. Railroad*, 5 Baxt. 663.)

In this latter case it was again held that the code made no distinction between cases of instantaneous death and others.

The case of *Brown v. Railroad Co.*, 22 N. Y. Ct. of App.

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191, is a decision upon a statute identical with the Nevada statute, so far as the first section, which confers the right of action, goes, and is precisely in point for the plaintiff. It was there held, that it makes no difference, under the New York statute, whether the death is the immediate or instantaneous result, or whether it is consequential.

So in Connecticut, under a statute providing that "actions for injury to the person, whether the same do or do not result in death, * * * shall survive to the executor or administrator" (Gen. St. of Conn., revision of 1866, sec. 98), it has been held, that the words "whether the injury do or do not result in death," have put an end to the common law maxim in this class of cases, that personal actions die with the person, and that it was immaterial whether death was instantaneous or consequential. The case in 9 Cushing is said to be somewhat "nice and technical," even as a construction of the statute of Massachusetts; but because the language of the statutes of the two states was not the same, it was not regarded by the supreme court of Connecticut as an authority which it was necessary to overrule. (*Murphy v. Railroad Co.*, 29 Conn. 496; S. C., 30 Id. 184.) My attention has not been called to any decision upon a statute at all like that of Nevada holding a contrary doctrine.

My conclusion is, that the demurrer must be sustained upon the first point discussed, and overruled upon the last. And it must be overruled upon the second ground for reasons stated in this opinion, with leave to the plaintiff to amend by inserting the facts in regard to the kindred as named in the act, if so advised.

Whether exemplary damages may be given in every case, or are to be confined to those cases in which they would have been allowed before the passage of the act, is a question upon which I intimate no opinion. (See *Myers v. San Francisco*, 42 Cal. 215.)

The demurrer is sustained, as stated, with leave to plaintiff to amend on or before the rule day in July, and defendant to plead on or before the rule day in August next.

Points decided.

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**B. F. DOWELL v. J. APPLGATE ET UX. AND C.
AND J. C. DRAIN AND J. ELLENSBERG ET AL.**

CIRCUIT COURT, DISTRICT OF OREGON.

JULY 8, 1881.

1. **CONVEYANCE—INSUFFICIENTLY STAMPED—EFFECT OF.**—Section 152 of the internal revenue act of June 30, 1864 (13 Stat. 292), as amended by act of July 13, 1866 (14 Stat. 141), while it avoids the record of a deed not duly stamped, or upon which the stamp is not cancelled, does not affect the validity of the original. Section 156 of said act (13 Stat. 293), imposes a penalty upon the vendor for not cancelling a stamp put upon his conveyance, but does not affect the validity of the conveyance itself. Section 158 of said act (13 Stat. 293), as amended by the act of July 13, 1866 (14 Stat. 142), imposes a penalty upon the maker for not duly stamping his conveyance, or omitting to cancel a stamp thereon, and declares the same void if either omission was made "with intent" to defraud the government; but whoever seeks to set aside or avoid a conveyance on that ground must allege and prove such fraudulent intent.
2. **OMISSION TO STAMP CONVEYANCE.**—An allegation that a conveyance was made and stamped for less than the actual consideration, with intent to aid or give color to a former fraudulent conveyance of the same premises to the grantor, or that such conveyance was made and stamped for an "inadequate" consideration, does not show that such conveyance was not duly stamped with intent to evade the stamp act.
3. **CONVEYANCE TO DEFRAUD CREDITORS.**—A purchaser from the grantee, in a conveyance to defraud creditors, without notice of the fraud, is, nevertheless, liable to any of such creditors for any portion of the purchase money remaining unpaid after notice of the fraud, and a court of equity will give such creditor a lien upon the premises for the amount.
4. **DEED, WHEN VOID UNDER THE INTERNAL REVENUE ACT.**—A deed alleged to have been made with the intent to evade the internal revenue act or to defraud the United States, is not therefore invalid under section 158 (13 Stat. 294; 14 Id. 152) thereof, and to make it so, it must also appear that the deed was made without being duly stamped and with the intent thereby to evade the revenue act.
5. **GRANTER IN DEED.**—Said section 158 only avoids a deed on account of the intent of the grantor therein, and it is immaterial with what intent the grantee receives it or to what use he puts it.
6. **AMENDMENT OF BILL.**—After a demurrer to a bill is allowed, the right to amend rests in the discretion of the court, and leave to amend will not be granted unless it is necessary to promote or attain the ends of justice in the case.
7. **CASE IN JUDGMENT.**—A demurrer to a bill being sustained, the plaintiff asked leave to amend, to the effect that a deed to the demurrants was void under said section 158, for want of being duly stamped, which was denied—it also appearing, that said parties were *bona fide* purchasers for an adequate consideration.

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Before DEADY, District Judge.

THE plaintiff *in propria persona*.

W. Carey Johnson, for defendants.

DEADY, J. This case was commenced in the state circuit court for Douglas county, on October 11, 1879, and after sundry proceedings therein, was removed to this court by the plaintiff, on December 23, 1880, on the ground that its determination involved the construction of certain provisions of the internal revenue act of June 30, 1864 (13 Stat. 223), and the amendments thereto.

Here the plaintiff has restated his case, in the form of a bill in chancery, called "the amended bill," which was filed April 6, 1881.

The bill is entitled as one "in aid of execution," and the relief sought is, that certain conveyances made by the defendant, Jesse Applegate and Cynthia Ann his wife, to William H. H. Applegate and others, their children, of one thousand and eleven acres of land, in Douglas county, between the years 1867 and 1869, except one made for one hundred and sixty acres, in 1871, may be set aside as fraudulent and void, so that the same may be sold and the proceeds applied upon a debt of six thousand five hundred and eighty-four dollars and nine cents, due the plaintiff from the defendant, J. A., upon a judgment obtained by the former against the latter, in 1878, for his share of a judgment obtained by the state of Oregon against the plaintiff and said defendant, on August 4, 1874, as the sureties in the official bond of Samuel E. May, secretary of state, dated August 4, 1866, and subsequently satisfied by the plaintiff.

The bill alleges, that the conveyance to the defendant, William H. H. Applegate, was for two hundred and forty acres of said land for the "apparent consideration" of five hundred dollars; that said defendant, on June 24, 1871, "deeded" two hundred acres of the same to Charles Drain and John C., his son, for the nominal consideration of five hundred dollars, while the actual consideration was two

thousand dollars in cash; that the consideration was expressed in the deed at the sum of five hundred dollars "to conceal the value of the land and to cheat and defraud the creditors" of said J. A., by making "the price correspond" with that of the deed to said defendant, William A.; and that the stamp thereon is only fifty cents, instead of two dollars, as required by the act of congress.

And further, that each and all of said conveyances, including those to said William A. and Charles and John C. Drain, "are illegal and a fraud under" the revenue act aforesaid; that an inadequate consideration was expressed in each of said deeds by the grantors and grantees, "with the intent of evading the provisions" of said act; that each of said deeds is stamped with a stamp of the value of fifty cents, and no more, although the grantors and grantees therein well knew that the land conveyed by each was, at the date thereof, worth more than one thousand dollars; that the record of said deeds was made in "violation of the spirit and meaning of sections 152, 156, and 158" of said revenue act; and that none of said stamps were "cancelled," as provided in said act, prior to the recording of said deeds.

The defendants, Charles and John C. Drain, demur to the bill. It is not alleged in the bill that they are not purchasers in good faith, and for a valuable consideration, and that they are such purchasers, was admitted on the argument, and therefore they are not affected by the alleged fraud in the conveyance to said William A.

The only question made upon the demurrer is, as to the validity of the deed to the Drains, under the stamp act of June 30, 1864, as amended by the act of July 13, 1866. The provisions of the act which are cited as bearing upon the question, are found in sections 152, 156, and 158 (13 Stat. 292-294; 14 Stat. 141, 142).

Section 152, as amended, makes it unlawful to record any conveyance not duly stamped, or upon which the stamps are not cancelled as required by law, and declares the record of such conveyance "utterly void," and prohibits it from being used in evidence.

It is plain that this section in no wise affects the validity

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of the original conveyance, but is confined to excluding it from the privilege of record, unless it is duly stamped and the stamps cancelled.

Section 156, which is not amended by the act of July 13, 1866, *supra*, imposes a penalty upon any person "who shall fraudulently make use of an adhesive stamp to denote any duty imposed by this act," without cancelling the same.

This is a penalty without a prohibition, at least in terms. But it does not follow, if it were both, that a conveyance made contrary to it—one upon which the stamp is fraudulently uncanceled—is therefore void.

Generally, where a penalty is imposed for the commission or omission of an act relating to a contract, without a prohibition of such contract, the same is not thereby made void.

In re Pittock, 2 Saw. 423, the court, following what it understood to be the doctrine of *Harris v. Runnels*, 12 How. 83, laid down the rule as follows: "Where a statute contains both a prohibition and a penalty, a contract or transaction contrary thereto is absolutely illegal and void, unless it appears, upon a consideration of the whole act, that the legislature did not so intend."

And it is also admitted, that a contract made contrary to a penalty may be held void, if such appears to have been the intention of the legislature.

In such cases, much depends upon the nature and amount of the penalty prescribed, and whether it is aimed at the contract itself, or only some form or incident of it—as, whether it was intended to prevent a contract or conveyance of the kind in question, or only as a security that it should be made on a certain kind of paper, or stamped with stamps of a certain value, which should be cancelled, so as to prevent their re-use.

In this case, the fact that the statute has, in section 158, in addition to the penalty imposed upon the maker for the omission to stamp a conveyance, provided specially that such conveyance shall be void in case such omission is the result of a fraudulent intent, tends strongly to show that it was not the intention of congress to make a conveyance void

for want of cancelling a stamp thereon, in addition to the penalty imposed on that account.

Upon a careful review of the whole act, and the circumstances of the case, it is very clear and satisfactory, that such was not the intention of the legislature; and the fact that the stamps were not duly cancelled, as alleged in the bill, so far as section 156 is concerned, is therefore altogether immaterial in this controversy.

Section 158, as amended, provides, that a person who makes a conveyance without duly stamping the same and cancelling the stamps, as required by law, "with intent to evade the provisions of this act," shall be subject to a penalty, and "such" conveyance "not being stamped according to law," shall be deemed invalid and of no effect.

The provision concerning the cancellation of stamps, and the clause, "not being stamped according to law," were added to this section by the amendment of 1866.

A conveyance made contrary to this section is void; but the mere omission to stamp the conveyance, or cancel the stamps, does not constitute or establish a violation of the section. It must be alleged and proved by the plaintiff, not only that the conveyance to the Drains was insufficiently stamped, or the stamps not cancelled, but that the omission in either case arose, not from accident or ignorance, but was the result of an "intent to evade the provisions" of the law; that is, with intent to defraud the government of the stamp duty. (*Campbell v. Wilcox*, 10 Wall. 422; *Green v. Holway*, 101 Mass: 243.) The act (schedule B) provides, that when the "consideration" of the conveyance does not exceed five hundred dollars, it shall be stamped with a stamp of the value of fifty cents, and an additional stamp of the same value for every additional five hundred dollars of consideration. The statement in the deed of the nature and amount of the consideration is at most only *prima facie* true, and may be contradicted. Therefore the stamps must be sufficient for the actual consideration, be that more or less.

It appears from the bill, that the conveyance in question is not sufficiently stamped, the true consideration being two thousand dollars, while that expressed in the deed, and for

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which it is stamped, is only five hundred dollars, and that the stamp actually used is not cancelled. But it does not appear that the omission to stamp the conveyance as for a consideration of two thousand dollars, rather than five hundred dollars, or the omission to cancel the one actually used, was the result of an intention to defraud the government; and this intent will not be presumed from the mere fact of the omission, which may have been caused by ignorance or accident. It must be alleged and proved, but the weight to be given to the fact of omission as an item of evidence, will depend upon the circumstances.

It is true, that every one is presumed to intend the ordinary consequences of his voluntary act (Or. Civ. Code, sec. 766, subd. 3), and it is equally true, that a necessary consequence of the omission to duly stamp this conveyance was a loss to the government. But it is still open to question, whether the omission was the voluntary act—the very will and purpose of the maker of the conveyance; and even if it was, whether the motive of the act was to defraud the government, or not.

No reason is alleged for the neglect to cancel the stamp, but the bill ascribes two contradictory motives for the omission to duly stamp the conveyance made by said William A. to the Drains: 1. To make the consideration correspond with that in the conveyance from J. A. to himself, and thereby to promote the purpose for which it was made—to defraud the creditors of said J. A.; and, 2. That an “inadequate” consideration was “expressed” in such conveyance with intent to evade the revenue act.

The omission to stamp the deed, from the first motive, does not render it void. An act done with a purpose to defraud, or aid in defrauding, the creditors of J. A., is not an act done, so far as appears, with intent to defraud the government. Nor does it matter how “inadequate” the consideration for the conveyance is, so that the stamp used corresponds with it in amount. The statute does not require a person to dispose of his property for an “adequate” consideration, with a view of enhancing the revenue of the government from that source, but very properly leaves that to

be cared for by the selfishness or the cupidity of the party interested. Neither is the allegation upon this point sufficient, although it suggests that the proper one was in the mind of the pleader. The consideration expressed must not only have been inadequate, but less than the amount actually paid. As section 158 of the stamp act, as amended by the act of March 3, 1865 (13 Stat. 481), provides that the title of a purchaser by deed duly stamped shall not be affected by the want of a stamp upon the deed of his grantor or predecessor in interest, the allegation in the bill, that the conveyance to said William A. was not duly stamped, is immaterial, so far as these defendants are concerned.

With this demurrer, there was also argued and submitted the demurrer of the defendant, Jonas Ellensburg, to said bill.

The case made in the bill against him is this: The defendant, Charles Putnam, a grandson of the defendant J. A., and one of the persons to whom said J. A. conveyed a portion of his real property as aforesaid, on January 19, 1879, sold forty-two acres of the same to said Jonas for the sum of three hundred and twenty dollars, of which two hundred and twenty dollars, or two hundred and forty-five dollars, has been paid, and delivered him possession thereof, with a paper writing in the form of a deed, but without a seal, which has been illegally admitted to record; and the prayer of the bill is, that said writing be declared "inferior" to the lien of the plaintiff's judgment, or that said Jonas be required to account to him for the balance due on said purchase.

The bill does not allege that J. E. had any notice of the alleged fraudulent character of the conveyance to his grantor, and therefore his purchase in writing, even if it does not amount to a full and formal conveyance, is good against the plaintiff, except as to the unpaid purchase money. For this the plaintiff may, if he makes out his case against Putnam and J. A., have a decree that J. E. pay the unpaid purchase money to him, and that he have a lien upon the land to secure the same. (*Wood v. Mann*, 1 Sumn. 507; *Flagg v.*

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Mann, 2 Id. 563; *McNeill v. Magee*, 1 Mason, 269; Story Eq. Jur., sec. 64, c; sec. 1503, a, b.)

The demurrer of Charles and John C. Drain is sustained, and the bill dismissed as to them; and that of Ellensburg is overruled.

SEPTEMBER 9, 1881.

Addison C. Gibbs and B. F. Dowell, for plaintiff.

W. Carey Johnson, for defendants.

DEADY, J. On July 8, 1881, a demurrer by the Drains to this bill was sustained, on the ground that it did not appear therefrom that the grantor had omitted to stamp the deed sufficiently with intent to defraud the revenue of the United States.

The plaintiff now moves for leave to amend his bill in this respect, and the defendants object, because the plaintiff, as to them, is seeking practically to enforce a forfeiture upon purely technical grounds against innocent purchasers, and therefore ought not to be favored by a court of equity; and because it does not appear but that the remaining property described in the bill as having been conveyed by J. A. to his children in fraud of his creditors, and still in their possession, is sufficient to satisfy the plaintiff's claim.

By the equity rule 35, the allowance of an amendment to a bill after a demurrer thereto has been sustained, is in the discretion of the court.

Stated briefly, the proposed amendment is to the effect: 1. That the deed in question was made and delivered with the intent to defraud the United States; 2. That it was made and delivered by the grantor, and accepted by the grantees, with intent to evade the provisions of the internal revenue acts; and, 3. That the Drains caused the said deed to be made and delivered, and used the same by having it recorded with intent to evade said acts, and with intent to defraud the United States out of a stamp duty of the value of one dollar and fifty cents.

The allegation that the deed was either made, delivered, accepted, or used with the intent to defraud the United

States is false upon its face. The United States had no interest in this property, or claim upon the grantor, J. A. or W. H. H. A., that would render a conveyance of it to the Drains or any one else fraudulent as to it.

What the pleader probably had in his mind but failed to express or allege, is, that the deed was made, delivered, accepted, and used without being duly stamped, with intent to evade, defraud, etc.

To stamp or omit to stamp a deed is something apart from and in addition to the making, delivering, accepting, or using the same; and an allegation that either of these things was done with intent to defraud the United States or evade its revenue laws, is not an allegation that such deed was made, delivered, accepted, or used without being duly stamped, and is therefore immaterial in this suit.

It is also immaterial with what intention the Drains accepted this deed. Section 158 of the internal revenue act (13 Stat. 193; 14 Id. 142) does not make any account of the intention with which a deed is "accepted" or received by the grantee. But in the case of a "bill of exchange, draft, order, or promissory note for the payment of money," it does provide that if such instrument is accepted, negotiated, or paid without being duly stamped, and with the intent to evade the provisions of the same act, it shall be invalid. The reason of this distinction is apparent. Whoever accepts a bill of exchange, thereby becomes an active party thereto. In effect and to that extent he makes or emits it—gives it a new life and circulation, and the intention with which he does so, so far as the stamp duty is concerned, is placed by the stamp act in the same category as that of the maker.

But in the case of any "instrument or document" other than negotiable paper, the intention or purpose of the party to or for whom it is made or delivered, or the use he puts it to or makes of it, is simply immaterial.

Nor is it material in this suit whether the Drains caused this deed to be made, within the meaning of the statute or not, and could only become so in an action against them for the penalty imposed by the act. If their grantor omitted

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to stamp it as required by law, with the intent to defraud the revenue, it is void, no matter who, or whether any one caused them to do so. Nor does it appear that the Drains caused this deed to be made, otherwise than by becoming the actual purchasers of the property described therein; and that this did not bring them within the purview or penalty of the statute is too plain for argument.

The proposed amendment is immaterial, and that is a sufficient reason why the motion should be denied.

But I do not think this amendment ought to be allowed, even if it contained the allegation that the deed to the Drains is void because the grantor therein made and delivered the same to them without its being duly stamped, and with intent to defraud the United States.

Amendments to a bill after a demurrer thereto has been sustained, are not allowed as a matter of right, but rest in the discretion of the court; and are only allowed when they are necessary to promote or attain the ends of justice in the case. (*Hunt v. Rousmaniere*, 2 Mason, 365.)

The case sought to be made against these defendants by the amendment is this: J. A., being a co-surety with the plaintiff on an official bond, is alleged to have conveyed the premises to his son without or upon a grossly inadequate consideration, with intent to defraud the state and the plaintiff, who has since been compelled to pay the bond. But it is admitted that the Drains purchased from the son for a sufficient consideration and without notice of such fraudulent intent, and are therefore not affected by it. Conceding this, however, it is claimed that the deed to the Drains is void because their grantor only put a stamp of the value of fifty cents on it when he should have put two dollars, with the intent to defraud the revenue of the difference, and therefore the property, for the purpose of this suit, must be considered as still held by the son under the fraudulent deed from J. A., and subject to be applied upon the latter's debt to the plaintiff.

But the plaintiff also imputes another, and, in my judgment, a more probable motive for the omission to stamp the deed sufficiently, and that is, that the consideration might

correspond with that in the deed from J. A. to his son, and thereby give strength to the claim that the former was a *bona fide* transaction based upon an adequate consideration.

It is not at all probable, while the actual consideration of the deed in question was two thousand dollars, that it would be expressed in the deed at five hundred dollars, merely to save the expense of stamps to the value of one dollar and fifty cents, and at the same time incur thereby a penalty of many times that sum; while it is not improbable that it may for some reason have been so done with a view of preserving an apparent uniformity in the considerations of the two conveyances.

The two motives could hardly co-exist, and there is such a want of probability as to the former, that as between them, the latter must be accepted as the true one. But in any event, the Drains are innocent purchasers, and not parties to, or participants in, either the alleged fraud or fraudulent intention; and while they may be affected by the invalidity of the deed to them on account of their grantor's fraudulent omission to sufficiently stamp the same, I do not think that justice or equity requires the court to permit the plaintiff to amend his bill after a demurrer thereto has been allowed, so as to enable him to enforce a claim to the property founded upon such invalidity—particularly as he had ample opportunity to bring the matter before the court by proper allegations in the amended bill to which the demurrer was taken.

Besides this, there is much force in the suggestion that the plaintiff ought not to be allowed to proceed against the property conveyed to the Drains, until it appears that the property of J. A., either in his own hands or that of his children, is not sufficient to satisfy his claim.

The motion to amend is denied, and the bill as to the defendants, Charles and John C. Drain, is dismissed with costs.

UNITED STATES v. GEORGE BRIDLEMAN.

DISTRICT COURT, DISTRICT OF OREGON,
JULY 15, 1881.

1. LARCENY OF INDIAN PROPERTY.—The Indian intercourse act of June 30, 1834 (4 Stat. 729), was extended over Oregon, so far as the same was applicable thereto, by act of June 5, 1850 (9 Stat. 437): *Held*, that the provision of said act of 1834, providing for the punishment of a white man for stealing the property of an Indian, and *vice versa*, was applicable to Oregon, and thereafter in force there; and that the same was not modified or repealed by the admission of the state into the Union—February 14, 1859 (11 Stat. 383).
2. UMATILLA RESERVATION, AN INDIAN COUNTRY.—The treaty of June 9, 1855 (12 Stat. 445), establishing the Umatilla reservation for the exclusive use of certain Indian tribes, was not modified or repealed by the act admitting Oregon into the Union, and from the date of such treaty, and by reason thereof, such reservation was and is "Indian country," and all laws for the punishment of crimes committed in such country are applicable thereto, and may be enforced in the United States courts for the district of Oregon.
3. INTERCOURSE WITH THE INDIAN TRIBES.—The power of congress to regulate the intercourse between the inhabitants of the United States and the Indian tribes therein, is not limited by state lines or governments, but may be exercised and enforced wherever the subject—Indian tribes—exists.

Before DEADY, District Judge.

Rufus Mallory, for the United States.

The defendant *in propria persona*.

DEADY, J. On July 7, 1881, an information was filed in this court, by the district attorney, charging the defendant with the larceny of a blanket from an Indian, on the Umatilla Indian reservation, in this district. The defendant pleaded not guilty, and the case was submitted to the court upon an agreed state of facts, to stand as and for a special verdict, as follows:

On July 1, 1881, the defendant, a white man, feloniously took and carried away from the Umatilla Indian reservation, in the district of Oregon, then under charge of an Indian agent, a blanket of the value of two dollars, the same being then and there the property of Slick-Shuck, an Indian, then belonging to and living upon said reservation, with a

prayer for judgment by the defendant, on the ground, that the court had no jurisdiction of the offense charged.

Section 25 of the act of June 30, 1834 (3 Stat. 733), "to regulate trade and intercourse with the Indian tribes," as modified by sections 2145 and 2146 of the revised statutes, enacts as follows:

"That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall be in force in the Indian country; provided, the same shall not extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country, who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively;" and section 5356 of the revised statutes enacts as follows: "Every person who, * * * in any place under the exclusive jurisdiction of the United States, takes and carries away, with intent to steal or purloin, the personal goods of another, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment."

It is decided, so far as this court is concerned, that the phrase "Indian country," as used in the act of 1834, *supra*, is a technical one, and only applies to such portions of the United States as are described in the first section thereof, or have since become such by and in pursuance of an act of congress, or a treaty of the United States, and that it does not extend or apply to any country, simply because it is owned or inhabited by Indians, in whole or in part; and also that said act was local, and only extended west to the Rocky mountains, and was never extended beyond them, *proprio vigore*, or otherwise than as specially provided by act of congress. (*United States v. Tbm*, 1 Or. 27; *United States v. Seveloff*, 2 Saw. 311.)

By section 5 of the act of June 5, 1850 (9 Stat. 437), to authorize "the negotiation of treaties with the Indian tribes

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in Oregon," and "for other purposes," it was enacted: "That the law [June 30, 1834, *supra*] regulating trade and intercourse with the Indian tribes east of the Rocky mountains, or such provisions of the same as may be applicable, be extended over the Indian tribes in the territory of Oregon."

Under this section, it was early held (*United States v. Tom, supra*), that so much of the act of 1834 as "tends to prevent immigration, the free occupation and use of the country by the whites, must be considered as repealed. Whatever militates against the true interests of a white population is inapplicable." But the provision (section 20) prohibiting the disposition of spirituous liquors to Indians was held applicable, as not being "necessary to the welfare" of the white people, but "a blessing to the Indians, and highly promotive of the safety, peace, and good order of the whole community."

This decision was followed in this district until section 20 of the act of June 30, 1834, was amended by the acts of February 13, 1862, and March 15, 1864 (12 Stat. 339; 13 Stat. 29), so as to make the disposing of spirituous liquor to an Indian, *under the charge of an Indian agent*, a crime, without reference to the locality in which it was done.

So, too, section 8 of the act, which prohibits any person from depasturing "the land belonging to any Indian, or Indian tribe," has been considered in force in Oregon, as to the land included within an Indian reservation, and enforced in this court. (*United States v. Mallock*, 2 Saw. 148.)

What other features of the act of 1834 were or were not applicable to Oregon, has not been decided; nor has it been specially considered what effect, if any, the making and ratification of the subsequent treaty under which this reservation exists and the admission of the state into the Union have upon this question.

In *United States v. Ward*, 1 Wool. 1, it was held by Mr. Justice Miller, that the act of 1834 conferred upon the national courts jurisdiction of offences against the laws of the United States, committed on Indian reservations in Kansas, but that the act admitting the state into the Union had so

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far modified that act as to deprive the circuit court of jurisdiction in that particular case, which was an indictment for murder committed by one white man upon another, upon a reservation set apart by treaty for the Kansas tribe of Indians. In *United States v. Yellow Sun*, 1 Dill. 271, it was held by Mr. Justice Dillon, that the national courts in Kansas did not have jurisdiction of the crime of murder committed within the state of Kansas and not upon a reservation, by Indians belonging to a reservation therein, with an intimation that if the crime had been committed *on* the reservation, the ruling would have been different.

In *United States v. Cisma*, 1 McLean, 256, it was held, that the power of congress to regulate commerce with the Indian tribes does not cease on their being included within the limits of a state, but that the federal jurisdiction must cease, or is lost, where the Indians occupy a very limited territory, and are practically absorbed in the surrounding white population.

But in *United States v. Holliday*, 3 Wall. 407, it was held by the supreme court, that the power of congress to regulate commerce with the Indian tribes is co-extensive with the subject, and applies to individuals constituting the tribes, although off a reservation and within the limits of a state, and therefore the act of 1864, *supra*, for the punishment of a person who disposes of spirituous liquor to an Indian, under the charge of an agent, is constitutional, although the disposition took place within the limits of a state, to an Indian not upon or belonging to a reservation.

On June 9, 1855, a treaty was made with the Wallawalla, Cayuse, Umatilla, and other tribes and bands of Indians in Oregon and Washington Territory, by which the reservation in question was set apart for the exclusive use of the Indians, in consideration of their ceding their rights to a large extent of country. The treaty (12 Stat. 945) provides, that the reservation "shall be set apart as a residence for said Indians; * * * all of which tract shall be set apart and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white person be permitted to

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reside upon the same, without permission of the agent and superintendent."

On February 14, 1859 (11 Stat. 383), the state of Oregon, with exterior boundaries, including the Umatilla reservation, was "received into the Union on an equal footing with the other states in all respects whatever," without any proviso or provision concerning the Indians or Indian reservations therein.

On March 8, 1859, the treaty was ratified by the senate, and on April 11th it was proclaimed by the president.

The power to regulate commerce with Indian tribes includes not only traffic in commodities, but intercourse with such tribes—the personal conduct of the white and other races to and with such tribes and the members thereof, and *vice versa*. (*Gibbons v. Ogden*, 9 Wheat. 189; *United States v. Holliday*, 3 Wall. 416.) If the power to regulate the intercourse between the Indian and the white man includes the power to punish the latter for *giving* the former a drink of spirituous liquor, within the limits of a state, as it undoubtedly does (*United States v. Holliday*, *supra*, 415), then it must follow, that the power to regulate such intercourse extends to and includes the power to punish any other act of a white man having or taking effect upon the person or property of an Indian, within such limits, and *vice versa*—even to the taking of life.

It is admitted that the power of congress to provide for the punishment of an act, as a crime, is limited to the subjects and places peculiar to the national government. Its power to do so arises from the locality of the act in question, when it is committed in a place within the exclusive jurisdiction of the United States, as its territories, forts, arsenals, etc.; and from the subject, when the punishment is imposed as a means of carrying into execution or enforcing any of the powers expressly granted to congress by the constitution—as the power to lay and collect taxes, to borrow money, to regulate commerce, etc.

The act of 1834, as a regulation of trade and intercourse with the Indian tribes in the "Indian country," as defined in section 1 of that act, was within the power of congress,

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both on the ground of locality and subject—such “Indian country” being without the limits of any state and therefore within the exclusive jurisdiction of the United States; and the intercourse with Indians being a subject within its jurisdiction generally. And, as when the act was extended over Oregon, on June 5, 1850, the latter was still a territory, the right to do so, rested upon the same grounds—the power of congress over the locality and the subject.

But when Oregon was admitted into the Union—February 14, 1859—the power of congress over the Indian tribes in Oregon or the intercourse between them and others, so far as it depended on the locality, was gone, unless, and so far, as it may have been saved by the operation of the treaty of June 9, 1855, establishing the Umatilla reservation. But the jurisdiction which was not dependent upon locality—the jurisdiction which arises out of the subject—the intercourse between the inhabitants of the state and the Indian tribes therein—remained as if no change had taken place in the relation of the territory to the general government. Congress could no longer prohibit the introduction, manufacture, or sale of spirituous liquor in the country, but only the disposition of it to Indians. And, as it could prohibit that, as well within the limits of a state as a place where it had exclusive jurisdiction, it could punish the violation of such prohibition in the former case as well as in the latter.

The necessary inference from these premises seems to be, that the act of 1834, or so much of it as congress was authorized to enact, within the limits of a state for the purpose of regulating the intercourse—the goings on—between the Indians and the inhabitants of the latter, remains in full force. Of this character are all the provisions of the act which punish persons for wrong or injury done to the person or property of an Indian, and *vice versa*.

This intercourse is a subject of federal jurisdiction, the same as the naturalization of aliens, the subject of bankruptcies or the establishment of post-offices, and therefore congress may pass laws regulating or even forbidding it and providing for the punishment of acts or conduct grow-

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ing out of it or connected therewith, resulting in injury to either the Indian or the other party, or calculated to interrupt or destroy its peaceful or beneficial character.

Section 5356 of the revised statutes which provides for the punishment of larceny committed in a place within the exclusive jurisdiction of the United States, was made a part of the act of 1834, by section 25 thereof, whenever the larceny was committed by a white man upon the goods of an Indian, and *vice versa*; and as such, it was, in my judgment, extended over Oregon on June 5, 1850—it not being locally inapplicable, any more than the provision concerning the disposition of spirituous liquor to an Indian. Nor did the admission of the state into the Union upon “an equal footing” with the other states have the effect to modify or repeal this provision. If the same provision could not be made and enforced in every other state, at the will of congress, then of course the admission of Oregon into the Union, upon an equality with the other states, would have worked a repeal of it. But congress has the power to legislate upon the subject of intercourse with the Indian tribes, wherever they exist, irrespective of state lines or governments; and this provision against larceny by the parties to this intercourse, being well calculated to preserve the peace between them and prevent the shedding of innocent blood and cruel and devastating Indian wars, is as convenient and necessary to that end as any other that can be suggested.

If congress can punish the defendant for *buying* Shick-Shuck's blanket—trading for it—why not for stealing it?

Upon the national government is devolved the power and duty to supervise and control the intercourse between the Indian and its citizens so that, so far as possible, each may be protected from wrong and injury by the other, and in the exercise of this power and the performance of this duty, it is not limited or restrained by the fact that the Indians are within the limits of a state. The Indians were here before the state was, and the state was formed and admitted into the Union subject to their right to remain here, and the power of congress over the intercourse between them and the people of the state, until they are removed, or become

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a part of the latter, through the agency or with the consent of the United States.

Nor is it material that the state has the general power to, and does, punish for larceny committed within its limits. So it has the power to regulate and control the disposition of spirituous liquor. But in neither case does this power exclude or supersede the paramount authority of the national government, where the larceny or disposition touches upon or affects a subject within its jurisdiction and power. As, for instance, the general police power of the state over the manufacture, sale, and use of distilled spirits within its limits, is subordinate to the act of congress, passed in pursuance of its power to regulate commerce, which permits the importation of such spirits into the state from foreign countries; nor can the state interfere with or tax the importer in the exercise of his right to sell and dispose of the same within its limits, in the original package. (*Brown v. Maryland*, 12 Wheat. 419; *License Cases*, 5 How. 573.)

The power to regulate commerce, being construed to include navigation (*Gibbons v. Ogden*, 9 Wheat. 186), it has been held by the supreme court that congress may in pursuance of this authority provide for the punishment of persons who steal goods or effects belonging to a vessel in distress or wrecked within the admiralty jurisdiction, although such goods are taken not immediately from the vessel but above high-water mark, on the land, and within the jurisdiction of the state. (*United States v. Coombs*, 12 Pet. 72.) Now, if congress in pursuance of its power to regulate commerce, can punish for the larceny of goods constituting an element of that commerce anywhere within the state, why may not it, in pursuance of the same power, punish the defendant for the larceny of a blanket, within the state, from a member of an Indian tribe, the intercourse with which is under its absolute control?

But there is another ground on which the jurisdiction of the United States to punish this offence may be safely placed. The ratification of the treaty of June 9, 1855, on March 8, 1859, took effect by relation from the date of its signing, so that it was in full force when the state was ad-

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mitted. (*United States v. Reynes*, 9 How. 143; *Davis v. The Police Court*, Id. 285; *Haver v. Yaker*, 9 Wall. 34.)

Like every other treaty made by the authority of the United States, this one was and is the supreme law of the land. (Con. U. S., art. VI, subd. 2; *Worcester v. Georgia*, 6 Pet. 515.) By it the Umatilla reservation was set apart for "the exclusive use" of the tribe of Indians to which Shick-Shuck belongs, and no white person was to be permitted "to reside upon the same" without the permission of the United States given by its superintendent and agent.

In my judgment, the effect of this treaty was to make the act of 1834 applicable thereto, except as otherwise provided therein, so that it became and is, to all intents and purposes, "Indian country," within the meaning of that phrase, as used in that act and the revised statutes.

The admission of the state into the Union, with this reservation established within its exterior lines, did not and could not have the effect to abrogate or modify this treaty. The act of admission is silent upon the subject, and admitting that the treaty might be repealed by an act of congress (*Taylor v. Morton*, 2 Cosh. 454; *The Clinton Bridge*, 1 Wool. 155; *The Cherokee Tobacco*, 11 Wall. 620), there is no reason to believe that congress intended by such act to affect it in any way. The necessity for the reservation was quite as apparent then as when it was created, and the treaty providing for it was ratified by the senate, within a month after the passage of the act of admission. The reservation has ever since been maintained by the United States, and congress has continued to recognize its existence as provided in the treaty, by making appropriations for its support.

In the *United States v. Leathers* (6 Saw. 17), and *United States v. Sturgeon* (Id. 29), in a well-considered opinion, Mr. Justice Hillyer held that an Indian reservation established in Nevada on March 3, 1874, by a mere executive order, for "the use" of certain Indians, and afterwards recognized as such by congress, was "Indian country" within the meaning of sections 2133, 2139, and 2148 of the revised statutes, providing for punishing persons who

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reside or trade in the Indian country without license, or return thither after being removed therefrom, or introduce spirituous liquor into such country, or dispose of the same to an Indian therein.

Assuming, then, that the Umatilla reservation exists as established by the treaty, it is still "Indian country" set apart by law for the "exclusive use" of the Indians, and all crimes committed within it, by a white man upon an Indian, and *vice versa*, and made punishable by the laws of the United States, are within the jurisdiction of the federal courts for this district.

There is also much force in the suggestion made by Mr. Justice Hillyer, in *United States v. Leathers, supra*, that as section 1 of the act of 1834, defining or ascribing the then limits or extent of the "Indian country," was repealed by title 74 of the revised statutes (December 1, 1873), there is now no Indian country to which the various provisions in title 28 of the revised statutes, relating to such country, and the conduct of persons thereon and thereabout, can apply, unless the several reservations set apart for their exclusive use in the various states are considered to be such.

UNITED STATES v. PHOEBE HUMASON. SAME v.
H. P. ISAACS. SAME v. O. S. SAVAGE.

CIRCUIT COURT, DISTRICT OF OREGON.

JULY 22, 1881.

1. OFFICIAL BOND—PROOF OF EXECUTION OF.—In an action upon an official bond, if the execution thereof is denied, it cannot be proved by a copy certified by the secretary of the treasury under section 882 of the revised statutes, but a copy certified by the register of the treasury under the seal of the department, under section 886 of the revised statutes, is sufficient proof of such execution, it being declared to have the same force as the original when duly authenticated or proved in court.
2. NONSUIT BY THE PLAINTIFF.—Under section 243 of the Oregon code, the plaintiff in an action can only become nonsuit before the trial commences or afterwards with the consent of the defendant; and this is considered the later and better rule generally.
3. NEW TRIAL—STALE CLAIM.—The United States delayed bringing an action against the sureties in the bond of a deceased Indian agent in

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Oregon, for an alleged failure to account for seven or eight thousand dollars received thereunder, for a period of fourteen years; and on the trial there was a verdict for the defendant by the direction of the court, because of the failure of the plaintiff to produce proof of the execution of the bond—which was denied—as provided in section 886 of the revised statutes: *Held*, that the plaintiff was guilty of negligence, and therefore was not entitled to a new trial; and that in passing upon the motion weight ought to be given to the fact of the long delay in bringing the suit, whereby it had become difficult, expensive, and almost impossible to make legal proof of facts which probably existed, tending to show that the deceased had duly disbursed the money in question.

4. STIPULATION TO ABIDE EVENT OF ANOTHER ACTION.—A stipulation in one action to abide the event of another, entitles either party thereto, to such proceedings in the former as will enable him to have the benefit of his stipulation, provided the result of the latter action is favorable to him.

Before DEADY, District Judge.

Rufus Mallory, for the United States.

Seneca Smith, for defendants, Humason and Isaacs.

William H. Effinger, for defendant, Savage.

DEADY, J. This action is brought against the defendant, Phoebe M. Humason, as executrix of the will of Orlando Humason, on two bonds executed by William Logan in his lifetime, as Indian agent, together with said Humason and H. P. Isaacs, W. C. Moody, and O. S. Savage, as sureties—the one on August 1, 1861, in the penal sum of twenty-five thousand dollars, and the other on July 1, 1862, in the sum of twenty thousand dollars, and both conditioned, that said Logan would “carefully discharge the duties” of said office and “faithfully expend all public moneys and honestly account for the same and for all public property which shall or may come into his hands, without fraud or delay.”

The case was first before the court on a demurrer to the complaint, which was overruled. (See 5 Saw. 537.)

It was again before the court on a demurrer to the third, fourth, and fifth pleas or defences contained in the answer, which was overruled. (6 Saw. 200.) On June 2, 1880, the plaintiff replied to the answer, and the cause was at issue upon questions of fact.

On February 19, 1881, the cause was tried with a jury, and a verdict was given for the defendant.

On the trial, the plaintiff proved the commissions to Logan as Indian agent, under which the bonds were executed, as alleged in the complaint, and then offered in evidence the transcripts of two bonds, purporting to have been executed by William Logan, as Indian agent and principal, and O. S. Savage, W. C. Moody, H. P. Isaacs, and O. Humason, as sureties, on August 1, 1861, and July 1, 1862, respectively, and certified by the secretary of the treasury under the seal of the department, on April 20, 1878, in pursuance of section 882 of the revised statutes, to be true copies of bonds on file in that department.

The execution of the bond by the defendant's testate being denied by the answer, the introduction of the transcripts was objected to by counsel, because they were not certified to under and in the manner prescribed by section 886 of the revised statutes, instead of section 882 thereof; and the objection was sustained.

The plaintiff then asked to become nonsuit, but the defendant objected, and asked that the case be submitted to the jury, which was done, with direction to find a verdict for the defendant.

In the case of *The United States v. H. P. Isaacs*, there was a stipulation, that it should abide the event of this action, and thereupon an order was made directing the latter to be included in the entry of the trial and verdict of the former; and the case of *The United States v. O. S. Savage*, standing upon a similar stipulation, was also included in such order.

On April 11th the plaintiff filed a motion for a new trial, which was argued and submitted on May 11th.

It is not claimed that the court erred in refusing to allow the plaintiff to become nonsuit.

By section 243 of the Oregon code a nonsuit can be granted on the motion of the plaintiff, only before trial, or afterwards with the consent of the defendant, and the later and better rule of the common law is to the same effect. Whenever the trial has been commenced, the right of the plaintiff to become nonsuit, and vex and harass the defend-

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ant with another action for the same cause, is gone. (*Folger v. The Robert G. Shaw*, 2 W. & M. 531.)

The power to grant a new trial is sufficient to prevent a failure of justice in the cases where a nonsuit was formerly suffered by the plaintiff to meet a surprise caused by the failure of evidence or an unexpected ruling of the court; in which proceeding the court may impose such terms and conditions upon the moving party as a due regard to the rights and convenience of the other may require.

Neither is it claimed that the court erred in refusing to admit the copies of the alleged bonds in evidence; because it is admitted that a copy of a bond certified under said section 882, is not evidence of the execution of such bond where the same is denied, but that it must be certified under section 886, by the register, subject to the right of the defendant to call for the production of the original instrument.

But a new trial as to the case of Humason is asked for on the ground of "accident on the part of the secretary of the treasury in certifying the copies of the bonds upon which the action" is brought under section 882 of the revised statutes instead of section 886 thereof, "which mistake was not discovered by the attorney for the United States, until at the trial, when the error was first discovered, the papers in the case having been forwarded to the attorney for the United States by the department of justice at Washington."

These certificates were made nearly three years before the trial, and the answer denying the execution of the bonds, and which first made it necessary to have copies of them certified by the register of the treasury, under section 886, was filed on August 6, 1879—at least eighteen months before the trial.

Upon this state of facts there is no ground to claim that the plaintiff was in contemplation of law surprised at the trial by the rejection of the copies of the bonds. The secretary of the treasury did not by either "accident" or mistake certify to copies of the bonds under the wrong section. When he made his certificate it was not known that the execution of the bonds would be denied; neither was

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the secretary authorized to make a certificate under any other section than the one he did. Besides the mistake or "accident" of the secretary, if any, is the mistake or accident of the plaintiff, whose officer and agent he is.

The copies of the bonds certified by the secretary were furnished to the district attorney, together with a transcript of the treasury books, accounts of the agent, and affidavits relating to them, to enable him to bring the proper action thereon; and when an issue of fact, if any, was made therein, it then became his duty to procure the proper evidence for the trial thereof. So, when the defendant denied the execution of the bonds, the burden of proof being cast upon the plaintiff, it was the duty of the district attorney to procure the proper evidence of such execution—a copy of the bonds, certified by the register of the treasury, under section 886, before going to trial.

No excuse is given or offered for this negligence. The probability is, that it occurred from inadvertence, in not observing or bearing in mind the provision in the statute, or the denial in the answer, or both. But in either case, the omission is the negligence of the plaintiff, for which a new trial ought not to be granted; at least, not unless, what is sometimes called "the justice of the case," strongly demands it, and then only upon terms compensatory to the adverse party.

But, upon a careful examination of the treasury transcripts and the circumstances of the case, as shown in the pleadings, I do not think the ends of justice demand a new trial in this case, but the contrary.

In this view of the matter, the execution of the bonds by Humason may be admitted. The denial by the defendant is only a constructive one, at best—a denial of "knowledge or information sufficient to form a belief" upon the question—and it may be taken for granted, that upon a new trial the plaintiff would be able to establish that fact beyond a doubt.

But the default of the principal, if any, and his death occurred near fourteen years before this action was brought against his sureties and sixteen years before it was brought

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to trial. Owing to the great lapse of time and the death of the principal it is difficult if not impossible to ascertain and make legal proof of facts affecting their liability, that very probably exist, and might have been shown with sufficient certainty, if this action had been brought within a reasonable time. And although the maxim—*nullum, tempus occurrat regi*, applies to the United States, as well as the crown, and therefore its right to bring this action is not barred by any lapse of time; still upon a motion for a new trial where a verdict has been obtained by the defendant, the court must take into consideration the hardship, if not injustice, of compelling the sureties under such circumstances to account for money received by their principal so long ago—and particularly when by his sudden death he was prevented from making and returning an account of it himself. True, the sureties were not without obligation and duty in this matter themselves; and if this consideration was now being urged as a reason why this action should not be maintained against the sureties, it might well be answered, that having undertaken for their principal, it was their duty to see that he kept the condition of his bond or take the consequences, and that when he died away from home with his accounts more than a quarter in arrear, it was their duty, through the appointment of an administrator and otherwise, to have his accounts made up and forwarded to the department for settlement. But this is a motion to set aside a verdict obtained by the defendant without any fault of hers, and the neglect of the plaintiff in asserting this claim until it has become stale, may be properly considered thereon.

The count upon the first bond alleges a failure to account for one thousand and six dollars and sixty cents received by Logan between August 1, 1861, and June 30, 1862, while in charge of the Warm Spring agency. This sum is made up of nine hundred and seventy-eight dollars and seventy-four cents that appears from Logan's verified statement to the department to have been in his hands, on June 30, 1862, and belonging to various specified funds applicable to the business of his agency; and twenty-seven dollars and

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thirty-two cents disallowed at the department in the examination of his accounts under the first bond. But it also appears from Logan's account current with the department for the quarter ending June 30, 1862, that the very same funds amounting to nine hundred and seventy-eight dollars and seventy-four cents were on July 1, 1862, credited to the United States by him under his second bond. And thus it appears from the treasury transcript itself that nothing is due upon the first bond, and therefore nothing ought to be recovered on it. The trifling differences between his accounts and the audit of the department, amounting in the aggregate to twenty-seven dollars and thirty-two cents, in a total expenditure of eleven thousand five hundred and sixty two dollars and thirty-five cents received under said bond, is not sufficient to affect the question.

The count upon the second bond alleges a failure to account for seven thousand six hundred and seventy-eight dollars and sixty-six cents, received by Logan between July 1, 1862, and May 19, 1865. This sum is made up of four thousand seven hundred and eighty-one dollars and one cent, that appears, from Logan's verified statement to the department, to have been in his hands on March 31, 1865, and belonging to various specified funds applicable to the business of his agency—of which three thousand nine hundred and seventy-five dollars and forty-one cents was applicable to the erection of a hospital, school, and dwelling-house; one thousand five hundred and sixty-eight dollars and forty-four cents to the payment and subsistence of specified employees; one hundred and twenty-one dollars and ninety-three cents to beneficial objects, under article II of the treaty of June 25, 1855, with the Indians of middle Oregon (12 Stat. 963); and one hundred and thirty-five dollars and twenty-three cents to expenses—and the remaining one thousand eight hundred and ninety-seven dollars and sixty-five cents of money received by the agent on the checks of Superintendent Huntington, drawn on the assistant treasurer at San Francisco, dated May 5, and paid May 19, 1865.

Some time early in June, 1865, Agent Logan appears to

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have taken his wife to San Francisco for medical treatment, where he remained until July 28th, when they sailed for Oregon on the steamer *Brother Jonathan*, and on July 30th were both lost by the foundering of the vessel off Crescent City, California, with all their effects then on board.

For this reason, I suppose, no account of moneys expended at the agency in charge of the deceased, after March 31, 1865, was returned, or is found in the treasury transcript. But it is quite certain that the business of the agency went on as usual during Logan's absence, and that the funds applicable to the payment and subsistence of employees and current expenses were disbursed by the person in charge, for the quarter ending June 30, 1865. It is also very probable that the portion of the funds on hand and applicable to the erection of the buildings being erected on the agency were largely expended during this quarter. It was not the policy of the department or the law to advance an agent, at any time, more funds than were needed for the expenditures of the current quarter.

The probabilities, then, are, that this sum of five thousand seven hundred and eighty-one dollars and one cent, that Agent Logan reported on hand on March 31, 1865, was all, or nearly all, expended on the reservation by the end of the quarter following, and that upon the death of himself and wife there was no one left with interest enough in his affairs to have his accounts for the period subsequent to March 31, 1865, made up and forwarded to the department, with the proper vouchers. The remaining one thousand eight hundred and ninety-seven dollars and sixty-five cents is made up in the treasury statement in this way:

On April 29, and May 8, 1865, Logan appears to have receipted to Superintendent Huntington for the sums of two thousand five hundred dollars and five hundred dollars, respectively; and on May 19, 1865, the superintendent's checks on the assistant treasurer, at San Francisco, for the sums of two thousand dollars and one thousand dollars respectively, and dated May 5, 1865, payable to William Logan or bearer, were paid to bearer, whoever that may have been, at that office. It seems to be admitted or taken

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for granted in the treasury statement that these two checks represent the money that Logan receipted to the superintendent for as above stated, and this I think is very probable. The discrepancy in dates and amounts between the receipts and checks probably arises from the fact that the receipts were not taken until some time after the checks were given, and it may be not until after Logan's death, when blanks were filled up for the gross amount with conjectural dates and sums in each as a voucher for the use of the superintendent.

By the treasury statement, Logan is charged under his second bond with this three thousand dollars in addition to the amount which it appears from his accounts that he received under said bond; and, also, the sum of two hundred and seventeen dollars and thirty-eight cents, differences between his account current of disbursements between July 1, 1862, and March 31, 1865, amounting to near fifty thousand dollars, and the audit of the treasury, arising principally from trifling errors in calculation and the non-payment or deduction of the small sums due the income tax from the salary or subsistence of the employees on the reservation during that period, together with one hundred and seventy-eight dollars and eleven cents for the property purchased in the first quarter of 1865, and not taken up on his property returns, on account probably of his absence and sudden death.

From this amount is deducted the salary due the agent from April 1 to July 28, 1865, the assumed date of his death—four hundred and eighty-nine dollars and thirteen cents, and the nine hundred and seventy-eight dollars and seventy-four cents aforesaid, in the agent's hands on June 30, 1861, under his first bond, and carried in his account on July 1, 1861, to the credit of the United States under his second bond, and twenty-nine dollars and ninety-eight cents which I have not discovered the origin of—the total of the debits being three thousand three hundred and ninety-five dollars and forty-nine cents and the credits one thousand four hundred and ninety-seven dollars and eighty-four cents,

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leaving the balance as above stated of one thousand eight hundred and ninety-seven dollars and sixty-five cents.

One of the defences to this action, is, in effect, that Logan was carrying five thousand dollars of the funds unaccounted for to Oregon as the agent of the plaintiff when he was drowned, which was lost without his fault or negligence. But by the schedule of checks drawn by Superintendent Huntington on the assistant treasurer in San Francisco between May 1 and July 31, 1865, it does not appear that within this period any other checks in favor of Logan were paid, than the two above mentioned, for three thousand dollars, except one for ten thousand dollars, drawn on June 10 and paid to Logan on June 20, 1865. This latter check appears to have been drawn for the use of the superintendent, and although the proceeds appear to have been received by Logan more than five weeks before he sailed for Oregon, it may be admitted that he had the amount in currency with him when he was drowned, and that it was then lost without his fault or that of the superintendent's. Upon this theory, the act of July 12, 1876 (19 Stat. 447), has been passed for the relief of the deceased superintendent's sureties, by which the accounting officers of the treasury are directed to credit his accounts with the amount; provided satisfactory proof is made of the loss.

But Logan is not charged with this ten thousand dollars, and the question of its loss is immaterial, so far as his accounts are concerned.

It does not appear that Logan had any of the three thousand dollars received on the two checks dated May 5th, and paid May 19th, in his custody when he was lost. He does not appear to have gone to San Francisco before June, and probably left Oregon about the 10th of that month—the date of the ten thousand dollar check—and therefore these two checks must have been drawn and paid before he went to San Francisco. There is, then, no probable ground on which it can be claimed that the money received on them was lost in the wreck of the *Brother Jonathan*, unless it is assumed that he took it with him to San Francisco, which

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is possible; but in that case, the money would be at his risk, and if lost, chargeable to him.

But admitting that this three thousand dollars came to Logan's hands by the transfer of the checks to a third person before he went to San Francisco, and that it was not lost at sea, it does not follow that it was not disbursed according to law.

The annual appropriations for the Indians of middle Oregon at the Warm Spring agency for special objects, in pursuance of articles II, III, and IV of the treaty aforesaid (12 Stat. 964) was seventeen thousand six hundred dollars, or four thousand four hundred dollars a quarter, of which the five thousand seven hundred and eighty-one dollars and one cent reported by Logan as on hand on March 31, 1865, did not include more than one thousand six hundred and ninety dollars and thirty-seven cents, and three thousand dollars added to this would make but little more than was required to be expended under those heads during the quarter ending June 30, 1865. But the agency was actually conducted four months upon these sums of five thousand seven hundred and eighty-one dollars and one cent, the balance on hand at the beginning of the second quarter of 1865, and the three thousand dollars supposed to have been received on the superintendent's checks in May of that year.

But, under the circumstances, it is possible that some portion of this money remained unexpended at his death, and may have been lost with him, or misappropriated by some one or in some way. But the probability is, that the amount was duly disbursed in the business of the agency, unless some portion of it was lost on the *Brother Jonathan*, and that by far the greater portion of it was so disbursed, I think there is no doubt.

But to get the legal evidence of this fact and produce it in court at this late day would be very difficult, if not impossible, and cost the defendant more than the amount of any probable deficiency.

Under the circumstances, it is much more just and reasonable that the plaintiff should be denied a new trial rather than that the defendant should incur the risk of having

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a judgment rendered against her for seven or eight thousand dollars, with interest for sixteen years, because by the death of Logan and the inexcusable delay of the former, it is no longer possible to make legal proof of the facts and circumstances as they actually transpired.

Another reason against allowing this motion, under the circumstances, is this, these bonds having been taken upon a larger condition than the law requires, to wit, that the principal would account for *all* money and property which came into his hands whether as Indian agent or otherwise—and as alleged, on the absolute demand of the commissioner of Indian affairs—it is doubtful under the authorities cited and commented on in the opinion in 6 Saw. 200 (*United States v. Tingley*, 5 Pet. 115; *Hawes v. Marchant*, 1 Curt. 140), if they are legal. In my own judgment, they ought to be held valid, in any event, as to money and property received by the principal under them, as Indian agent, but no farther. (*United States v. Bradley*, 10 Pet. 343.)

The motion for a new trial is denied, and the defendant must have judgment that she go hence without day.

In the case of the surety Isaacs, the motion for a new trial rests upon the same grounds as the preceding one, and is denied for the same reason.

In the case against Savage, the motion for a new trial is based upon the further ground, that when the order was made in pursuance of the stipulation of the parties, including this case within the verdict in *The United States v. Humason*, there was no answer to the complaint on file, and therefore there ought not to have been a verdict for the defendant.

But it is admitted that there was a verbal stipulation between the counsel for the plaintiff and the defendant, to the effect that this case should abide the result of the case against Humason; and this stipulation was admitted by the district attorney in open court when the order was made, although he protested that he ought not to be bound by it, as it would not have been made if he had thought the Humason case would have gone off on a technical failure of proof of the execution of the bonds, as it did.

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But the court ruled, that if the stipulation was admitted, the case must follow the disposition of the Humason one, and thereupon the order was made without other or further objection; but it then appearing that the defendant had failed to answer, and it being suggested by the court that the record would show error in the proceeding if there was a verdict for the defendant without an answer controverting the material allegations of the complaint, an order was made, without objection, giving the defendant leave to file such an answer, as of some day between the filing of the complaint and the trial, which he did, or attempted to do, as of February 16th.

Objection is taken to this proceeding as being irregular, but in what the irregularity consists is not apparent. The foundation of it was the stipulation of the parties, and when that was admitted and its binding effect considered, what followed was a mere matter of form, and even had the consent of the parties at the time.

It might have been as well to have waited until final judgment had been given in the Humason case, and if that was in favor of the defendant, then to have moved to dismiss this one. But in some form the defendant was entitled under that stipulation to have his case share the fate of the one against Humason.

But admitting the regularity of the proceedings thus far, counsel for the plaintiff insists that the verdict ought to be set aside in this case because the answer of the defendant does not controvert or deny the execution of the bonds, but in effect admits it.

The answer of Savage contains a denial of the execution of the bonds "except as hereinafter stated," and then "admits that at the dates mentioned he did, along with his co-obligors mentioned, make a bond to the plaintiff," but does not "remember" the penalty or condition thereof.

It may be admitted that this is not a good denial of the execution or condition of the bond, but it is a question whether it is not sufficient to prevent judgment for want of an answer. If the plaintiff considered the answer not such an one, in this or other respects, as the defendant was en-

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titled to file under the order of the court, he should have moved to strike it out.

Besides, the object of making the order allowing the defendant to file an answer *nunc pro tunc*, was not so much, if at all, to compel him to make a defence to the action, as to give him the privilege of so doing, so as to secure to himself beyond a peradventure, the benefit of his stipulation, that his case should abide the event of the other one.

The stipulation was made without an answer being filed, and virtually suspended proceedings in the case; and if the defendant had seen proper, he might have waited until there was a final judgment in the case against Humason, and if such judgment was for the defendant, then moved on his stipulation to dismiss the action against him, without answering the complaint at all.

But apart from the attempted denial of the execution of the bonds, the answer is a sufficient defence to the action, as it contains an allegation to the effect that Logan faithfully kept the condition of his bonds. That is sufficient to support the verdict and prevent the record from being erroneous on its face, and that was the only object in allowing an answer to be filed at all.

These are all the special grounds on which a new trial is asked in this case, and they are not sufficient.

UNITED STATES v. THOMAS R. MOSELY ET AL.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

JULY 25, 1881.

1. BOND FOR VALUE—AMENDMENT TO LIBEL OF INFORMATION—LIABILITY OF BONDSMEN.—Where property under seizure has been delivered on bond given for value, the bondsmen are liable for the penalty of the bond, in case the property is condemned by the final decree of the court in the cause, and it is immaterial that the decree was upon a libel amended by leave of the court subsequently to the execution of the bond.

Before HOFFMAN, District Judge.

A. P. Van Duzer, assistant United States attorney, for United States.

W. W. Morrow, for defendants.

HOFFMAN, J. The ground of forfeiture set forth in the original libel in this case, was, in substance, that the master and crew of the schooner *San Diego* had, without the consent of the Alaska Commercial Company, taken and killed seals in the waters adjacent to the islands of St. Paul and St. George, in Alaska Territory, in violation of section 1967 of the United States revised statutes. The amended libel alleged the killing to have been done within the limits of Alaska Territory and in the waters thereof, to wit, on and near Otter Island and in the neighborhood of and adjacent thereto, in violation of section 1956 of the revised statutes.

The killing alleged in either case was unlawful, and contrary to the provisions of title XXIII, chapter 3, of the revised statutes, enacted for the protection and preservation of fur-bearing animals in Alaska Territory.

But the pleader was misinformed as to the precise *locus in quo* where the killing was effected. He was therefore allowed to amend his libel so as to conform to the facts. On this amended libel the vessel and skins were condemned. The claimants had previously given bonds for the appraised value of the vessel and cargo. The present suits are brought on these bonds, and it is contended, on the part of the sureties, that the effect of allowing the amendment which has been mentioned was to exonerate them from all liability under their bonds, by means of which they obtained a delivery to them of the property seized.

The bonds are in the usual form. They may be said to consist of three parts:

1. The bond proper, by which an absolute obligation is created to pay to the United States a specified sum of money.

2. A recital setting forth, that a libel of information, etc., had been filed; that the property was in the custody of the marshal, and their appraised value.

3. The conditions or clause of defeasance, to the effect, that if, on the condemnation of the goods, the obligors shall pay into court their said appraised value, then the obligation to be void, etc.

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With regard to the libel of information, the recital in the bond for the skins states, that it has been filed on behalf of the United States against one thousand six hundred and fifty fur-seal skins, "*for reasons and causes in said libel of information mentioned.*"

It is claimed by the defendants, that the effect of this clause is to restrict the obligations of the bondsmen to a liability for the penalty of the bonds, in case the goods shall be condemned for the reasons and causes mentioned in the original libel; and that, inasmuch as they were condemned for reasons and causes set forth in an amended libel, the bondsmen are discharged.

But the nature and extent of the obligation assumed by the bondsmen are to be ascertained, not from a clause in the recital, which is no essential part of the instrument, and which might have been entirely omitted, but from the terms of the condition or clause of defeasance which specify under what circumstances the obligation shall become void.

These are: 1. "In case the said one thousand six hundred and fifty fur-seal skins shall, by *the final sentence, decree, or judgment of the said court, be condemned as forfeited*; and 2. If the said Mosely, etc., their heirs, etc., shall thereupon pay into the said court the sum of six thousand one hundred and eighty-seven dollars and fifty cents."

It is plain that the obligation to pay is conditioned upon the condemnation of the goods as forfeited in the suit then pending, but it is not conditioned upon their condemnation for the precise reasons and causes in the original libel of information mentioned.

In the original form of bond, submitted to the court for approval, the words "*for the causes in said libel set forth,*" were added in the condition of the bond, but they were stricken out by direction of the judge, as appears by his initials in the margin. This could only have been done for the purpose of avoiding the very question which is now raised, and of exacting from the claimants to whom the goods were to be delivered, an obligation to pay their ap-

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praised value in case they should be condemned by any decree which the court might lawfully make in the suit.

In the bond given for the vessel, a printed form was used, which does not contain the words inserted in the manuscript bond, and stricken out by the judge, as above stated.

No question is, or can be, raised as to the right and duty of the court to allow the amendment to the libel. The decree stands, therefore, as the final decree of condemnation lawfully made, and thus the very contingency has occurred upon which, by the terms of the obligation, the bondsmen were to become liable.

But, independently of the foregoing considerations, I entertain no doubt that the settled rule of the admiralty is, that where a bond has been given for property under seizure and the property has been delivered to the claimant, the bond stands in the place of, and represents the *rem*, and that whatever amendments the court might lawfully allow, if the property had remained in the custody of the marshal, it can equally allow without affecting the liability of the bondsmen. Any other rule would be inconvenient and pernicious.

Libels are often necessarily drawn in haste, and with an imperfect or mistaken conception of the facts. A bond for value may be tendered at once. If this be done, and the vessel restored to the claimant, and if the libellant be from that moment deprived of all right to amend, except on pain of discharging the bondsmen, and thus rendering the litigation fruitless, it is evident that the grossest injustice might be done in cases where the property has been removed from the jurisdiction and no reseizure can be made. The suggestion, that the claimant and his sureties have agreed to be responsible only in case the property is condemned "for the reasons and cause mentioned in the libel," involves a *petitio principii*. It is more accurate to say that they have agreed to be responsible in case the court, in the due and ordinary course of procedure, shall condemn the property; and the allowance of proper amendments must be deemed to have been contemplated as a possible or probable incident in the cause.

In the case of *Newell v. Norton and Ship*, 3 Wall. 257,

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the libel had been amended by dismissing it as to a pilot who had been improperly joined in a suit against the master and vessel.

It was argued then as now, that the sureties "bound themselves with reference to this libel, that their contract was *stricti juris*, and could not be extended by implication."

But the court summarily overruled the objection, observing, in the language of Mr. Justice Story, in the *Schooner Hamburg*, 1 Gall. 123: "Every person bailing such property is considered as holding it subject to all legal dispositions of the court."

In the case before Mr. Justice Story, the amendment moved for was the addition of a new substantive cause of action against which the statute of limitations had run, and it was disallowed for that reason. With regard to the objection, that the rights of the sureties might be affected, he says: "I will only add that a third objection that it might affect the rights of the sureties on the bond given for the property, has not been considered of weight in any cases at common law. When the property has been delivered on bond, it is too much to contend that the rights of the court can be increased or diminished by that circumstance. Any person so bailing the property is considered as holding it subject to all legal dispositions by the court. *A fortiori*, the objection would, with great difficulty, find support in a court exercising admiralty jurisdiction."

In the *Maggie Jones*, 5 Cent. Law J. 263, it was insisted that an amendment permitting the name of one Bradley to be added as co-libellant discharged the sureties.

But the court says: "This position is untenable; I regard it as settled by the case of *Newell v. Norton and Ship*, 3 Wall. 257, that the undertaking of the surety is practically co-extensive with the liability of the vessel in that particular action, and subject to any amendment which the court has power to make. The addition of a new party, or indeed any other amendment which the court has power to make in the original case, has usually been held not to affect the undertaking of the surety."

In the case of *Evans v. Lager*, 28 Mich. 47, the court

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says: "If the court possessed the power to order or allow such an amendment irrespective of the stipulations of the parties, the sureties would have been bound by its action because their obligation must be understood as contemplating a possible exercise of such power."

Numerous other authorities might no doubt be found on the point under consideration. Enough have been cited to establish that where property under seizure has been delivered to a claimant on a bond for value, conditioned that he will pay the value into court if a final decree of condemnation be rendered against the property, his liability and that of his sureties are fixed as soon as the court has legally rendered such a decree on the action. And it is immaterial whether the decree has been rendered on the original libel, or on a libel that has been legally and properly amended subsequently to the execution of the bond.

CORVALLIS FRUIT CO. v. CHARLES CURRAN ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

AUGUST 5, 1881.

1. INFRINGEMENT.—A machine for drying fruit, which employs substantially the forms and mechanical contrivances of the one patented to William S. Plummer, is an infringement of such patent, although in some respects it is an improvement upon the latter.
2. EVIDENCE.—A patent is *prima facie* evidence that the patentee was the inventor of the thing patented, and of its novelty and utility.

Before DEADY, District Judge.

Wallis Nash, R. S. Strahan, and D. R. Kennedy, for plaintiff.

Cyrus A. Dolph, W. R. Bilyeu, and J. K. Weatherford, for defendants.

DEADY, J. On May 22, 1877, a patent, numbered 191,072, was issued to William S. Plummer "for an alleged new and useful improvement in fruit-dryers," for the term of seventeen years; and on October 9th of the same year a re-

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issue of said patent, numbered 195,948, was made to him. The specification of the second patent states that "the object of this invention is to furnish an improved apparatus for drying fruit, which shall be simple in construction, convenient in use, and effective in operation, drying the fruit rapidly and evenly, and which shall be so constructed that it may be readily taken down, set up, and moved from place to place;" and that "the invention consists in the case provided in its lower part with a lining set at a little distance from its walls, the large door, the small door, the cleats or slides to receive the fruit frames or trays, the doors, and the cover and cap to allow the moisture-laden air to escape, to adapt it for use in drying fruit."

Having thus described his invention, he claims "as new"—"The case A, provided in its lower part with a lining, B, set at a little distance from its walls, the large door G, the small door H, the cleats or slides I, to receive the fruit frames or trays, and the cover and cap L M, to allow the moisture-laden air to escape, substantially as herein shown and described, to adapt it for use in drying fruit."

On December 1, 1879, the plaintiff, The Corvallis Fruit Company, became the lawful assignee of said patents and improvements for the county of Linn, Oregon; and on January 13, 1881, it brought this suit to restrain the defendants from infringing the same by the manufacture and sale of fruit dryers in said county, "produced by the inventions and improvements described and claimed in said letters patent."

On June 27th, an application for a provisional injunction was heard upon the bill and sundry affidavits, and the models of the respective machines.

The Plummer fruit-dryer is a wooden case three feet six inches square, and six feet two inches high, with a fixed inverted hopper-shaped cap or cover having an aperture in in which a tube is inserted to allow the steam to escape from within. In the lower part of the case is the hot-air chamber, with a lining of brick or metal at a little distance from the outer wall of the case, to facilitate the ascent of the hot air towards and upon the sides of the case, so as to dry the

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fruit evenly—upon the edges of the trays as well as the centre.

The air is heated in this chamber by a box-stove or furnace two feet long and one and a half feet wide. Above this cleats are fastened to the sides of the case about four inches apart, upon which rest the movable trays containing the fruit to be dried, and in front of each tray is a door that opens perpendicularly, through which it can be taken out and replaced.

The defendants admit they are making and vending a fruit-dryer in Linn county known as the Thomas fruit-dryer, and claim that it was invented by the defendant, Charles Thomas, and that he has applied for a patent therefor.

Upon the argument it was stated by counsel for the defendants, that a decision was daily expected upon this application, and the consideration of this motion has since been delayed to await the result of such application; but as yet, nothing has been heard from it, so far as I am advised.

The Thomas dryer is similar in form and operation to the Plummer dryer, except that the space between the wall and lining of the hot-air chamber in the latter is carried in the former up to the top of the case, by means of metal lining a little distance from the walls of the case. The effect of this, is to distribute the heat more evenly throughout the drying chamber, and to produce a greater uniformity in the results. The cap or cover upon the Thomas dryer is flatter than that on the Plummer, and is movable. It is also claimed that it is so shaped inside as that when the hot air from the space between the lining and the wall of the case, strikes it, it is thrown downwards and inwards upon the upper trays of fruit, which are otherwise the longer drying. The other differences are mere differences in form or mechanical contrivance, as in the shape of the stove and the door to the drying chamber, which latter is in one piece, and opens horizontally instead of perpendicularly.

The continuation of the space for hot air on the sides of the Thomas dryer to the top of the case is probably a patentable improvement on the Plummer one; and it may be that the change in the cap is also. But all the rest of the Thomas

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dryer is substantially the same in form and operation as the Plummer one, and therefore an infringement upon the plaintiff's patent.

Upon the argument counsel for the defendant questioned the validity of the plaintiff's patent on the ground that it lacks novelty.

But the patent is *prima facie* evidence that the patentee is the inventor of the thing patented, and of the novelty and utility thereof. (Curt. Pat., secs. 470 *et seq.*; *Seymour v. Osborne*, 11 Wall. 538.)

No attempt has been made to overcome this evidence of novelty except by the introduction of patents for drying or preserving fruit or vegetables as follows: Nos. 121,569, December 5, 1871; 121,795, December 12, 1871; 120,253, October 24, 1871; and 4792, March 5, 1872. But all the machines described in these, except the last, are very different in form, operation, and mechanical contrivance from the Plummer dryer—in particular, as they involve the use of machinery for exhausting or blowing the air into or from the machine.

The last one does rely upon the natural tendency of heated air to move upwards, as the Plummer machine does, but its mechanism and contrivance appear much more complex and costly.

It appearing, then, that the Thomas machine, although in one respect an improvement upon the Plummer one, is in other respects an infringement upon it, and that the defendants are manufacturing and selling their machine for considerably less than the price of the Plummer one, and thereby preventing the sale of the plaintiff's machine, to its manifest injury, a provisional injunction will be allowed until the final hearing or the further order of this court, upon the plaintiffs' giving bond in the sum of two thousand dollars, with sureties to the approval of the master.

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THE CLATSOP CHIEF—F. B. JONES, CLAIMANT.

DISTRICT COURT, DISTRICT OF OREGON.

AUGUST 9, 1881.

1. JOINDER OF CLAIM IN REM AND IN PERSONAM.—Under admiralty rule 15, in a suit for damage by collision, a claim *in rem* and *in personam* cannot be joined in one libel.
2. SEMBLE.—That but for said rule they might be so joined, and that convenience in prosecuting the claim would thereby be promoted.
3. FELLOW-SERVANT—INJURY TO.—Exception to libel for injury to a fireman on a steam vessel caused by the negligence of the master, on the ground that they were fellow-servants of a common employer, and that such fireman was aware of the incompetence of the master, overruled, upon the impression that the fireman and master were not fellow-servants in the sense which excuses the common employer from liability for an injury suffered by one in consequence of the misconduct or negligence of the other, with leave to raise the question upon the final hearing.
4. TORTS, ADMIRALTY JURISDICTION.—The national courts have jurisdiction of a tort committed anywhere upon the navigable waters of the United States. The ruling in *Holmes v. O. & C. Ry. Co.*, 6 Saw. 265, followed.
5. INJURY TO EMPLOYEE ON STEAM VESSEL.—The remedy given by sec. 4493 of the revised statutes, for an injury to an employee on a steam vessel, is merely cumulative, and does not exclude the right to any other remedy for such injury, which may be given by the general admiralty law.

Before DEADY, District Judge.

W. Scott Bebee and Sidney Dell, for libellant.*David Goodsell and D. P. Kennedy*, for owner.

DEADY, J. The libel alleges that on February 28, 1881, the *Clatsop Chief*, a steam-tug, duly enrolled and licensed, at Portland, in the District of Wallamet, and engaged in towing on the Columbia and Wallamet rivers, was proceeding down the Columbia at fifteen minutes after 8 P. M., opposite to Willow bar, with a large scow in tow, when by reason of the want of skill and care of the master of said steam-tug, she collided with the steamship *Oregon*, then ascending said river, whereby Andrew Kay, then serving as fireman on board said *Clatsop Chief*, was "precipitated" into said river and drowned; that said collision was caused by the violation of the rules of navigation owing to the

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gross ignorance and incompetence of the master of the *Clatsop Chief*, who was wholly incompetent and unfit for the duties of said employment, all of which was well known to the owner thereof at the time of his employment and afterwards; that the libellant is the widow of said Andrew Kay, and the "sole distributee" of his estate, and on April 15th, was duly appointed administrator of said estate, wherefore she brings this suit against said vessel and her owner to recover the sum of five thousand dollars, "according to the statute of the state of Oregon in such case made and provided, and under the general admiralty law."

Upon an interlocutory order of May 18th, the vessel was sold for one thousand eight hundred and fifty dollars, and the proceeds, less the fees and expenses of the marshal, one hundred and sixty-eight dollars and twenty-nine cents, were paid into the registry of the court to await the result of the suit and the intervention of sundry material-men whose claims have since been confessed for near three thousand dollars.

The owner, B. F. Jones, appears and excepts to the libel for that: 1. It appears therefrom that there is a misjoinder therein of a suit *in rem* and *in personam*; 2. That the deceased was a fellow-servant of the master of the *Clatsop Chief*, and therefore neither the vessel nor her owner is liable for the injury caused by the latter's negligence or want of skill; 3. That said Andrew Kay had due notice of the alleged incompetence of said master; and 4. That the matter is not within the admiralty jurisdiction of the United States and of this court.

The first exception appears to be well taken. By the admiralty rule 15, it is provided, that "in all suits for damages by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone *in personam*." It is a contested point, whether, independent of or antecedent to this rule, a party who was entitled to a remedy *in rem* and also *in personam*, might pursue the same, either against the vessel and master, or the vessel and owner, in one suit. Mr. Benedict (Ben. Ad., sec. 397) is of the opinion that he could, while Judge

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Conkling (2 Conk. U. S. Ad. 42) thinks it "extremely questionable." In *The Citizens' Bank v. The N. S. Co.*, 2 Story, 16, decided (1841) before the promulgation of the admiralty rules, Mr. Justice Story (p. 58) said: "In cases of collision, the injured party may proceed *in rem* or *in personam*, or successively in each way, until he has full satisfaction. But I do not understand how the proceedings can be blended in the libel." (See, also, *The Ann*, 1 Mason, 512; *The Cassius*, 2 Story, 99.)

My own impression of the matter is with Mr. Benedict, when he says (sec. 397, *supra*), "that whenever the libellant's cause of action gives him, at the same time, a lien or privilege against the thing, and a full personal right against the owner, then he may by a libel, properly framed, proceed against the person and the thing, and compel the owner to come in and submit to the decree of the court against him personally in the same suit, for any possible deficiency." It is a question simply of procedure, and should be determined mainly, if not altogether, upon considerations of fitness and convenience; and every argument drawn from this source is in favor of the joinder of the remedies *in rem* and *in personam*, whoever the person may be, and pursuing them in one libel, as one suit.

The case is analogous to that of a debt arising out of the personal obligation of the debtor and secured by a pledge or mortgage of specific property. In modern procedure, at least, the remedy against the person and the property is had in one suit, wherein there is first a judgment establishing the debt against the debtor and the liability of the property, and that the latter be sold to satisfy the debt, and that the remainder of the judgment, if any, be enforced against the defendant personally.

But whatever might have been the correct practice before the adoption of the admiralty rules by the supreme court (Jan. term, 1845) I think that the fifteenth of these rules, fairly construed, does prohibit the joinder of the proceeding for collision against the vessel and the owner, when it provides that the libellant may proceed against the ship *and* master or the ship alone, *or* against the master

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or owner alone. As Judge Conkling (2 Conk. Ad. 43) says: "Such would seem to be the reasonable and sound view of the subject." In 2 Par. S. & A. 378, it is said that under the rule "no suit will lie against an owner *in personam* jointly with a suit *in rem* against the vessel." In *Newell v. Norton et Ship*, 3 Wall. 257, it appears to have been so held in the district and circuit court for Louisiana and practically affirmed in the supreme court, although Mr. Justice Grier, in delivering the opinion of the court (p. 266), is erroneously made to say, that a libel *in rem* and *in personam* against the owner was in conformity with admiralty rule 15, and therefore an objection in the lower courts that such libels "cannot be joined was properly overruled," when in fact it was sustained and the libel dismissed as to the owner, and the ruling affirmed in the supreme court.

In the *Richard Doane*, 2 Ben. 111 (1868) it was held by Mr. Justice Blatchford, that admiralty rule 15 excludes any other mode of procedure, in suits for damage by collision, than that specified in and allowed by the rule; and that therefore a suit for a collision cannot be maintained against a vessel *in rem*, and her owner *in personam*, unless her owner is also master. To the same effect is the ruling in *The Zodiac*, 5 Fed. Rep. 223; and *The Sabine*, 101 U. S. 386. So far this exception has been considered on the theory that this is a case of damage by collision within the purview of rule 15, and that the libellant has a lien for the claim and may therefor sue *in rem* or *in personam*, and upon this assumption it was argued by counsel.

But is this true? The claim of the libellant is to recover damages under section 367 of the Oregon civil code, for the death of a human being, caused, it is alleged, by the misconduct of the owner of the *Clatsop Chief*.

By rule 16, a suit for a direct injury to the person—an assault or beating—within the admiralty jurisdiction must be *in personam*. The case of a death resulting from such injury or the negligence of another is not provided for in the rules. In the *Sea Gull* (Chase's Dec. 146), which was a suit *in rem* by a husband for the death of his wife, a stewardess on the *Leary*, caused by a collision with the *Sea Gull*,

it was held that the remedy might be *in rem* as well as *in personam*, upon the ground that in principle there is no distinction in this respect between wrong to *persons* and *things*. But in the *Highland Light* (Id. 151), which was a suit *in rem* by the widow for the death of her husband, employed at the time as a "hand" on the *Highland Light*, caused by the collapsing of her steam chimney, it was held that under section 30 of the steamboat act of 1852, 10 Stat. 72, since section 43 of the act of 1871, 16 stat. 445, now section 4493 of the revised statutes, that the remedy *in rem* for an injury caused by a neglect to comply with the law governing the navigation of steam vessels was confined to passengers, and therefore persons employed thereon and injured in consequence of such neglect, were limited to the remedy *in personam*.

This case apparently comes within that ruling, as the deceased was employed on the *Clatsop Chief* and lost his life, as is alleged, by the neglect of the master to obey the rules governing the navigation of said vessel in passing the *Oregon*. A collision and his death was the consequence of this neglect.

As to the second and third exceptions they are disallowed. It does not appear from the libel, as assumed by the latter, that the deceased was aware of the alleged incompetence of the master; and if it did, it does not necessarily follow that such knowledge is a defence to the action.

And while it does appear, that the deceased was in the service of the same person as the master, and engaged in the same general employment, it does not follow from this, that he was a "fellow-servant" of the master's in that sense which would exonerate the common employer from liability for an injury to one of them, caused by the negligence or misconduct of the other.

The deceased was merely the fireman on the *Clatsop Chief*, and, as such, subject to the orders of the master. He was an inferior servant, injured by the misconduct of a superior one, for which injury there is much authority and more reason, for holding the common employer liable. (*Packet Company v. McCue*, 17 Wall. 513; *Railway Company v. Fort*, Id. 557; *Bera Stone Company v. Craft*, 31 Ohio State, 289;

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C. & N. W. Ry. Co. v. Morando, 34 Am. Rep. 168; S. C., 93 Ill. 302; *Devany v. Vulcan Iron Works*, 4 Mo. App. 236; *Brabbitts v. C. & N. W. R. R. Co.*, 38 Mo. 289; *Gormly v. Vulcan Iron Works*, 61 Id. 492; *The Chandos*, 6 Saw. 548.)

Besides, it is alleged in the libel, that the incompetency of the master was well known to the owner at the time of his employment; and if this be the case, the owner is liable for an injury caused by such incompetence, even if the master and fireman were fellow-servants in any sense. (2 Thomp. Neg. 970.)

The defence sought to be made upon these exceptions, can be made on the final hearing, on proper allegations and proof.

The fourth exception is disallowed.

The question raised by it was decided in this court in *Holmes v. O. & C. Ry. Co.* (6 Saw. 265), in which it was held that a marine tort is one that occurs on any navigable water of the United States, and that damages given by a state statute for such a tort may be recovered in the proper district court in admiralty.

SEPTEMBER 9, 1881.

Upon a re-argument of the case, the following opinion was this day delivered:

DEADY, J. On August 9, 1881, an opinion was delivered in this case to the effect that the libellant, Emma Kay, could not, under admiralty rule 15, maintain a proceeding *in rem* and *in personam* in one libel for damages for the death of her husband by a collision, while serving as fireman on the offending vessel—the *Clatsop Chief*. It was also then suggested, whether the libellant could maintain a suit *in rem* at all, in view of the ruling of Chief Justice Chase, in *The Highland Light* (Chase's Dec. 151), in which it was held, that by section 30 of the steamboat act of 1852 (10 Stat. 72), since become section 43 of the act of 1874 (16 Stat. 445), and now section 4493 of the revised statutes, such remedy in the case of an injury caused by a neglect to

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comply with the law governing the navigation of steam vessels was confined to passengers; and that persons merely employed thereon, were limited to the remedy *in personam* for such injuries.

Upon further argument and reflection I think the better conclusion is, that the provisions in section 4493 of the revised statutes concerning remedies are only cumulative, and therefore do not take away or exclude any right to a proceeding *in rem* for an injury to an employee on a steam vessel, incurred while in the line of his employment, which was given or allowed by the general admiralty law. (See *Brown v. The D. S. Cage and Owners*, 1 Wood, 404.)

In addition, it appears that the offending vessel is made subject to a lien by the local law, "for damages or injuries done to person or property by such boat or vessel." (Or. Laws, p. 656, sec. 17, subd. 4.) But such lien is thereby postponed to the liens for wages, materials, wharfage, and towage. (Or. Laws, p. 657, sec. 18.)

But the conclusion reached upon the first exception at the former hearing must still prevail, for as has been shown under admiralty rule 15, the libellant can not proceed *in rem* and *in personam* at the same time.

But she may amend her libel by striking out the vessel or the owner, and proceed against the other accordingly.

ROSANA J. SPRIGG v. J. B. STUMP.

CIRCUIT COURT, DISTRICT OF OREGON.

AUGUST 10, 1881.

1. ADJUDICATION OF INSANITY.—An order of a county court adjudging a person insane under the asylum act of September 27, 1862 (Or. Laws, p. 620), is valid and authorized the subsequent appointment of a guardian for such person, as insane, although the application for such order was not verified and such insane person was brought before said court upon the order thereof by being taken into the custody of the sheriff, without cause being shown therefor upon oath or affirmation.
2. WARRANT.—The warrant prohibited by section 9 of article I of the constitution of Oregon from issuing without cause being shown therefor on oath or affirmation is process for the arrest of a person on a criminal

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charge for the purpose of bringing him to trial or answer therefor, and does not include an order of a county court requiring an alleged lunatic to be brought before it for examination, for the purpose of being committed to an asylum; and if such order and the arrest were invalid as not being made on oath, that would not render the subsequent inquisition of lunacy, commitment to the asylum, and appointment of a guardian invalid.

3. **DIRECTORY STATUTE.**—Section 21 of the act of June 4, 1859 (Sess. L. 12), providing that the proceedings of the county court in law cases, probate and county business shall be kept and entered in separate books, is only directory, and an order or judgment of said court entered in any of its books of record is nevertheless valid; and, *quære*, does the inquisition of lunacy authorized by the asylum act of September 27, 1862 (Or. Laws, 620), to be had by and before the county *judge* on the "application of any citizen in writing," belong to either of these three classes of business, and may not the action of the judge therein be duly shown by orders reduced to writing and signed by him and filed in the county clerk's office?
4. **SALE OF LANDS BY GUARDIAN.**—A county court has jurisdiction to license the sale of lands by a guardian appointed by itself, upon the presentation by such guardian of a verified petition therefor stating the condition of the ward's estate and the circumstances tending to show the necessity or expediency of such sale; and the petition is sufficient to give jurisdiction when the order granting the license is attacked collaterally, if it appears therefrom or by reasonable inference from the facts stated therein, that the ward had no income, and that it was necessary to sell his land to maintain him in the insane asylum as provided by law.
5. **JUDGMENT NUNC PRO TUNC.**—When and under what circumstances it may be entered.

Before SAWYER, Circuit Judge, and DEADY, District Judge.

MOTION for a new trial.

W. W. Chapman, for plaintiff.

Walter W. Thayer, for defendant.

By the Court, DEADY, J. This action is brought by the plaintiff, a citizen of Arkansas, against the defendant, a citizen of Oregon, to recover the possession of the undivided half of donation No. 49, situate in Polk county, and containing three hundred and twenty acres, and damages for the detention thereof; alleging that he is the owner of the same in fee, and entitled to the possession thereof in common with James F. Levins, the owner of the other undivided half of the property.

The defendant by his answer denies the allegations of the complaint, as to the ownership of the premises and the plaintiff's right to the possession thereof, and pleads title in himself and a former adjudication.

The case was tried before the district judge with a jury, who, under the direction of the court, found a verdict for the defendant.

Thereupon the plaintiff moved for a new trial, which was argued before the circuit and district judge and taken under advisement.

On the trial, the plaintiff gave evidence tending to prove that one William Fulton, in his life-time, was the owner of the premises, and that he died intestate in 1876, leaving a niece and nephew—the plaintiff and said Levins—as his sole heirs at law, who thereupon became, and still are, entitled to the possession of the same.

In support of the plea of former adjudication, the defendant offered in evidence the judgment roll of an action brought on February 29, 1875, in the circuit court of the state, for Polk county, by the guardian of said William Fulton, then an insane person, against the defendant herein, to recover the possession of said premises, in which there was a verdict for the defendant, in December, 1875, and a judgment entered thereon, on May 14, 1879, as and for December 10, 1875, and some years after the death of said Fulton, which, upon the objection of the plaintiff, was excluded from the jury, on the ground that the court had no authority to order the entry of said judgment *nunc pro tunc*, because: 1. There was then no plaintiff in the action; and 2. The term at which the judgment should have been entered had passed by. (See Or. Civ. Code, secs. 262, 265.)

The defendant then gave in evidence, against the objections of the plaintiff, certified copies of a petition of J. L. Collins, to the county court of Polk county, and filed therein on February 2, 1863, alleging that said Fulton "is laboring under mental derangement" and "suffering from neglect," and asking the court "to inquire into the matter" and dispose of it according to the act of September 27,

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1862, entitled, "An act to provide for the safe keeping and treatment of insane and idiotic persons," and the proceedings thereon, from which it appears that said Fulton was by order of said court brought before it, by the sheriff, on March 3, 1863, and upon the evidence of David Pyle, a physician, that he was "an insane person," was sent to the insane asylum, at Portland, where he was received on March 4, 1863; and certified copies of the application of David W. Allingham, on March 7, 1863, to be appointed guardian of said Fulton and the order thereon of the same date, appointing said Allingham guardian of the estate of said Fulton, in which it is recited that the latter had "been duly convicted of insanity and sent to the insane asylum, at Portland," the oath of said Allingham, as guardian, dated April 7th, his bond dated April 25th and filed May 4th, the letters of guardianship issued to him on May 4, 1863, and the exhibit of the estate verified and filed July 5, 1865; and certified copies of the petition of said guardian to said county court to sell the real property of said Fulton, verified and filed on October 2, 1866, in which it is alleged "that said Fulton is an insane person now confined to the insane asylum of the state of Oregon; that the personal property of the said Fulton is not sufficient to pay expenses accruing in consequence of the necessary care and treatment of the said Fulton; that as there is but little hope of the recovery of said Fulton from his insanity, if the sale of the said lands should be more than sufficient to meet the wants of the said Fulton while insane, the money put at interest will ultimately be of greater value to the said Fulton in any event than the real estate;" the order setting the petition for hearing on November 6th, and directing notice thereof to be given by publication for three weeks, to all persons interested, the order dated November 7th, allowing the sale, wherein it is stated that "it appearing to the court that it would be for the best interest of said ward to sell the" real property belonging to said Fulton, it is ordered that said guardian sell the same as by law required, describing, among others, the premises in controversy by metes and bounds; the oath of the guardian of the same date to dis-

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pose of the property "as will be most for the advantage of all persons interested therein;" the bond of said guardian in the penal sum of ten thousand dollars, conditioned to sell such property and account for the proceeds of the sale as provided by law, dated January 7, 1867, and filed March 11th. The certificate of the sheriff of said county filed on February 6th, stating that the premises were sold by him "at the instance of said guardian, on January 8, 1867, to Alexander Hodges, he being the highest bidder therefor, for nine hundred and sixty dollars in gold coin, payable in five years, with interest at the rate of 12 per cent. per annum, payable in advance, and secured by mortgage on the premises; and the order of said court dated February 7, 1867, confirming said sale and directing the guardian to execute a conveyance thereof to the purchaser. The guardian conveyed to Hodges on March 11, 1867, who, on October 10, 1870, conveyed the north half of the premises to J. S. Bevens, and the south half to M. R. Davis, who afterwards conveyed to the defendant—the latter on October 26, 1871, and the former on December 7, 1872.

The first point made by the plaintiff in support of the motion for a new trial is, that the court erred in admitting the copies of the proceedings upon the inquisition of lunacy, because the originals were void, not having been kept and entered in the proper book. To understand this objection it is necessary to premise that the county court "has the jurisdiction pertaining to probate courts and boards of county commissioners, * * * and such civil jurisdiction not exceeding the amount of value of five hundred dollars * * * as may be prescribed by law" (Con., art. VII, sec. 12); and by section 876 of the civil code, it is provided that these three kinds of business, to wit, 1. Cases at law; 2. Probate business; and, 3. County business, "shall be entered and kept in separate books;" and the argument of the plaintiff is that these orders belong to probate business, but have been entered in the book with county business, and are therefore void.

The argument assumes that said section 876 was in force when these transactions took place. But this is a mistake.

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The civil code, although passed on October 11, 1862, did not take effect until June 1, 1863. But upon examination we find that substantially the same provision concerning "the settlement of the estates of minors, idiots, and lunatics, and all cases of the nature of probate," and "all county business," was contained in section 21 of the act of June 4, 1859, relating to county courts (Sess. Laws, p. 12), and then and until June 1, 1863, in force and applicable to these proceedings.

It does not appear from the certificate of the clerk to these copies—dated October 13, 1874—that the originals were not entered in a separate book. On the contrary, the fair inference from the certificate is that they were so kept. The clerk describes himself as "the keeper of the probate records," and then certifies that the transcript is a true copy of the original orders made by the court in the "commitment" and estate of William Fulton. But on the hearing of the motion for a new trial the plaintiff read a duly certified transcript, dated March 11, 1881, of the whole record of the proceedings of the county court for the months of February and March, 1863, doing county business, in which is found the entry of the proceedings upon the inquisition of lunacy in the case of William Fulton, to which is added in the certificate, the statement that no entry concerning such inquisition is found in the record of probate business.

Assuming that this is sufficient evidence of the fact that the proceedings on the inquisition of lunacy were kept in the record of county business and not that of probate business, and that the plaintiff is excusable for not producing such evidence on the trial if he deemed it material, what is the effect of it?

At the date of the act of June 4, 1859, *supra*, and until September 27, 1862, there was no insane asylum in this state, and a county court had no authority to make or hold an inquisition of lunacy except for the purpose of appointing a guardian of the lunatic's person and estate upon the application in writing of certain persons named. (Act of Dec. 15, 1853, secs. 9, 10; Or. Laws, p. 555.)

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On September 27, 1862, an act was passed “to provide for the safe keeping of insane and idiotic persons.”

Section 1 of this act authorized the governor to contract with “some suitable person” for the safe keeping of the insane. Section 2 was merely a rehash of the law then in force authorizing the county court to appoint a guardian for the person and estate of a lunatic, without any reference to it. Section 3 authorized “the county judge of any county * * * upon the *application* of any citizen *in writing*,” stating that any person “is suffering under mental derangement,” to cause such person “to be brought before him at such time and place as he may direct,” then and there to be examined by “one or more competent physicians,” selected by said judge. If upon such examination the physician should “certify on oath” that the person examined was insane, then the judge was required to cause such person to be placed in charge of the contractors for keeping the insane—primarily at the expense of the state; but it was also made the duty of the county judge to see that the estate of the insane person, if any, was applied to meet such expense. For the first two years the price paid was twelve dollars per week, and for the next four years ten dollars. From this it will be seen that it is doubtful to what class of business an inquisition of lunacy taken under the act of 1862 belongs. It does not come within the enumeration of the act of June 4, 1859, and was not authorized when that act was passed. It is somewhat *sui generis*. The proceeding need not be in court, but may be had before the county judge at any time or place he may name; and for aught that appears may be kept in paper and not entered in any book. In this particular case it seems the judge likened it to county business, and had the proceedings entered and kept accordingly as of a regular term of the court. But admitting that he erred in this matter and that the inquisition should have been kept and entered in the records of the probate business as claimed by the plaintiff, still the result is not affected by this mistake of the officer. The act directing the business transacted in the county court to be kept and entered in different books according to a certain classification of the same, is

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so far a mere regulation for convenience, and not of the essence of the thing to be done, and therefore only directory. When a statute gives directions or makes provisions concerning the time and manner of doing an official act, affecting the rights and duties of third persons, it will generally be considered directory unless the nature of the act to be done or the language of the statute indicates the contrary. (Smith's Com., sec. 670; Cooley's Const. Lim. 74; *Tbney v. Milbury*, 21 Pick. 67; *Corbett v. Bradley*, 7 Nev. 107; *People v. Cook*, 14 Barb. 290; S. C., 8 N. Y. 67; *Rex v. Loxdale*, 1 Burr. 447.)

In this latter case Lord Mansfield said: "There is a known distinction between circumstances which are of the *essence* of a thing required to be done by an act of parliament, and clauses merely *directory*."

In the case under consideration there is nothing in the nature of the act to be done nor the language of the statute directing it to be done, that indicates that it was the intention of the legislature to make the validity of a judgment or order of a county court duly given or made depend upon the fact that it is recorded in a particular book, and that if from the ignorance or negligence of the clerk it is entered in the wrong one, it is therefore void.

The statute requiring the proceedings in this inquisition of lunacy to be kept and entered in a particular book with a certain class of business is merely directory; and although the officer ought to have obeyed it, third persons are not to suffer for his omissions to do so. The entry of the proceedings in the records of the court was essential—the essence of the thing to be done—but whether in a book with this or that class of business was a mere matter of convenience, and the statute providing for it is therefore directory.

The plaintiff also insists that the inquisition is void, because taken upon a petition not verified—because, as counsel states it, Fulton was arrested and imprisoned in the asylum without "probable cause supported by oath or affirmation," contrary to section 9 of article I of the constitution of the state, which provides that "no warrant shall issue but upon probable cause supported by oath or

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affirmation, and particularly describing the place to be searched and the person or thing to be seized." This provision is copied from the fourth amendment to the constitution of the United States, and was placed there on account of a well-known controversy concerning the legality of general warrants in England, shortly before the revolution, not so much to introduce new principles as to guard private rights already recognized by the common law. (2 Story on the Con. 1902; Conk. Treat. 615.) These warrants were issued from the secretary's office for the arrest of persons concerned in the printing and publishing of obscene or seditious libels, without naming any one. At length in *Mooney v. Leach*, 3 Burr. 1742 (*anno* 1765), they were declared void for uncertainty; the case being, as to the legality of such a warrant issued by the Earl of Halifax, without information on oath, commanding the arrest of "the printers and publishers" of a "seditious libel, entitled the North Briton, No. 45," without naming any one. And on April 22, 1766, the house of commons voted that such warrants were illegal. (4 Black. 292, n. k.)

The law, as thus declared, was put beyond controversy, as to the government of the Union, by this fourth amendment, and from there transferred to the constitution of the states. At the same time, there being some doubt whether the common law absolutely required that a warrant should issue only upon information on oath, the clause concerning probable cause on oath was added. (Hale's P. C. 582; 4 Black. 290; *Mooney v. Leach*, *supra*, De Grey *arguendo*, 1764.)

Undoubtedly, then, the legal effect of this provision of the constitution is that process of any kind for the arrest of a person upon a criminal charge is void, unless issued upon sufficient information under oath, and an arrest thereon is unlawful. (*Ex parte Ruford*, 3 Cr. 448.)

But it is not so clear that the inquisition authorized by said section 3 of the asylum act involves the issue of a warrant and an arrest thereon of the alleged insane person within the meaning of this provision. The county judge is to cause such person to be brought before him, which may

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be accomplished by going to him, as the act allows the judge to appoint the time and place for the inquisition. But, ordinarily, a person "laboring under mental derangement" can only be brought before the county judge in the usual sense of the phrase by a resort to force or artifice. In this case there was an order directed to the sheriff commanding him to bring Fulton before the court "on the presumption of insanity," to be dealt with according to the statute, and the sheriff made a return thereon that he "arrested" the person named and brought him before the court.

This order, judged by its purpose and mode of execution, was in effect a process for the arrest of Fulton issued without information upon oath. But all process for the arrest of a party is not included in the word "warrant" as used in the constitution. A *capias*, or writ of arrest in a civil action, is not a "warrant" in that sense, and it issued at common law as a matter of course without oath. (3 Black. 281.) A warrant within the meaning of the constitution is an authority for the arrest of a person upon a criminal charge with a view to his commitment and trial thereon.

The arrest of a person upon a charge of insanity for the purpose of his commitment or confinement in an insane asylum, is, strictly speaking, an arrest neither in a civil nor a criminal proceeding, but is one *sui generis*. Still it partakes more of the character of the latter than the former, and ought not, in this day of regard for personal liberty, to be allowed otherwise than upon information on oath. This act, which practically allows the arrest of a person upon the charge of insanity on the unverified statement of any citizen, and his commitment to the asylum upon the verified statement of any one "physician," selected by the county judge, that he is insane, was probably prepared and passed in the interest of the contractors, who naturally enough wanted the entry to the asylum made expeditious and easy.

At common law the king was the guardian of lunatics and the custody of them was intrusted by him to the chancellor. Upon a petition or information alleging the insanity of any one, the chancellor granted a commission to inquire into the matter by the verdict of a jury, and if the person was

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thus found insane, committed him to the care of some friend, called his committee. (1 Black. 304.) This petition was probably not upon oath, but the party was not restrained of his liberty until after the verdict of the jury which established his insanity.

In the draft of the New York code of civil procedure—sections 1563–1574—(1849) the appointment of a committee for an insane person is provided for. The application is made to the surrogate by a verified petition stating the facts, and inquisition thereon is made by a jury at the place of the party's residence, upon notice to him and some member of his family; and in the draft of the civil code—section 139—(1865) a county judge is authorized to commit a person to an insane asylum, being “first satisfied by the oath of two reputable physicians that such person is of unsound mind, and unfit to be at large;” and even then the party, “his or her husband or wife, or relative to the third degree,” may demand and have an inquisition of lunacy by a jury.

But admitting, what we think very doubtful, that the order upon which Fulton was arrested and brought before the county judge, although in the form of the statute, was void as being in conflict with section 9, *supra*, of the constitution, concerning the issue of warrants, still the subsequent inquisition by the judge and the order thereon committing Fulton to the asylum are founded upon the oath of the physician who examined him and pronounced him insane. If, then, the validity of the subsequent appointment of a guardian and the sale by him of the lunatic's property depend upon the legality of the procedure in which Fulton was declared insane, it is certainly sufficient if the inquisition and commitment were legal, even if the original arrest was otherwise.

So long as the order of the county court committing Fulton to the asylum remained unreversed and in force, he could not have been discharged therefrom on *habeas corpus* on the ground that he was illegally restrained of his liberty, whatever might be thought of the legality of the order on which he was brought before the court. It follows that when Allingham applied to be appointed guardian of Ful-

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ton, the latter was lawfully adjudged insane and committed to the asylum.

This application was made under sections 9 and 10 of the act of 1852, *supra*, and might have been made and heard without reference to the previous action of the court under the asylum act of 1862, in which case the question of Fulton's insanity would have been tried and determined by the county judge as an ordinary question of fact. But the application was made upon the assumption that the matter of Fulton's insanity was *res judicata*, and the order appointing the guardian so recites. But no particular objection is made to this order upon the ground that in making it the question of insanity was not considered an open and original one. The claim of the plaintiff is that all the proceedings as to the custody and sanity of Fulton and the management and disposition of his estate depend for their validity upon the legality of the order of February 3, 1863, directing Fulton to be brought before it upon the charge of insanity and his arrest thereon. But as we have seen, the order was probably well made although upon information not under oath, and if this were otherwise, the legality of the subsequent inquisition and adjudication of insanity is not affected thereby.

Assuming, then, as we do, that Fulton was lawfully adjudged insane, and that such adjudication authorized the appointment of a guardian without any further inquiry or finding on the subject, the only remaining question in this case is, was the sale of the premises by the guardian legal? and the answer depends upon the sufficiency of the petition of the guardian for the order of sale.

The act of December 16, 1853 (Or. Laws, p. 738), provides that when "the income of the estate" of "a minor, insane person, or spendthrift" is "insufficient to maintain the ward and his family, his guardian may sell his real estate for that purpose upon obtaining a license therefor" from the county court; and he may make such sale upon obtaining such license, and invest the proceeds "in some productive stock" or put them "out on interest," when "it shall appear

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upon the representation" of such guardian "that it would be for the benefit of his ward." (Secs. 1, 2.)

To obtain this license the guardian must present to the court "in which he was appointed guardian, a petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances under which it is founded, tending to show the necessity or expediency of such sale, which petition shall be verified by the oath of the petitioner." (Sec. 6.) Upon this petition, if it appears therefrom that such sale "is necessary" or "would be beneficial for the ward," the court is authorized to grant the license to sell, upon notice to the next of kin and others interested in the estate. (Sec. 7.)

Section 20 of the act provides that in an action relating to property sold by a guardian in which any person claiming under the ward shall contest the validity of such sale, "the same shall not be avoided on account of any irregularity in the proceedings; *provided*, it shall appear: 1. That the guardian was licensed to make the sale by a county court of competent jurisdiction;" 2, 3, and 4. That he gave the bond, took the oath, and gave notice of the time and place of sale as prescribed by law; and, 5. "That the premises were sold accordingly, at public auction, and are held by one who purchased them in good faith."

This provision of this act was evidently framed upon the theory, that the then territorial courts of probate were not courts of general jurisdiction, and that the evidence of their jurisdiction and its regular exercise must appear on the face of their proceedings, and by way of securing the same from collateral attack, within certain limits, provides that they shall not be so questioned, unless for one of the errors specified in the aforesaid five particulars. But the constitution of the state, as expounded by the supreme court in *Tustin v. Gaunt*, 3 Or. 306, having conferred the jurisdiction of probate matters upon the county courts and made them courts of general jurisdiction, their judgments in this respect, but for this statute, could not now be questioned collaterally upon any ground except that of jurisdiction. (*Gager v. Henry*, 5 Saw. 237.)

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But no question is made in this case as to the sufficiency of the bond and oath of the guardian, or the notice and manner of sale, and if the court acquired jurisdiction to grant the license to sell, the sale was valid. It is true, that the bond does not affirmatively appear to have been approved by the judge, as required by the statute (sec. 20, *supra*), and was not filed until after the sale. But no objection was made on the trial to its admission on these grounds, and it is too late to do so now, if desired. On the argument, it was suggested that the county court of Polk county had jurisdiction to license this sale, because, in the language of the statute (sec. 6, *supra*), it was the court in which the guardian who made it was appointed, and therefore its regularity cannot be inquired into in this action. But we think the more reasonable construction of the clause (sec. 20, *supra*)—"was licensed to make the sale, by a county court of competent jurisdiction"—is, that the court which licensed the sale must not only have had jurisdiction potentially of the class of cases to which this belongs, but must have actually acquired it in this particular one by the presentation of a proper petition therefor—one containing the jurisdictional facts.

In *Gager v. Henry*, *supra*, this court—Field and Deady, JJ.—held that the application of a guardian to sell the lands of his ward was a proceeding in the nature of a proceeding *in rem*, conducted by the ward through his guardian in the interest and for the benefit of the former; that the court acquires jurisdiction thereof upon the filing of a proper petition therefor, and that the judgment of the court upon said petition cannot be questioned collaterally except as provided by statute.

But the plaintiff contends that the order licensing this sale was void, because the petition therefor was not sufficient to give the court jurisdiction, for the reason that it does not state with sufficient particularity "the condition" of the ward's estate, or "the facts and circumstances" "tending to show the necessity or expediency of such a sale," citing *Stuart v. Allen*, 16 Cal. 474; *Fitch v. Miller*, 20 Id. 352; *The Estate of Smith*, 51 Id. 563.

In the latter of these cases, the question as to the sufficiency of the petition to sell, arose upon demurrer, and was decided upon an appeal, and therefore it is not in point.

The first case (*Stuart v. Allen*) involved the validity of a sale by an administrator upon an order of the probate court, which was alleged to be void because the petition therefor did not state facts sufficient to give the court jurisdiction, that is, did not state the amount of the personal estate that had come to the hands of the administratrix, and how much thereof remained undisposed of. The petition referred to the inventory of the personal property on file, and stated that "it was wholly insufficient to pay the indebtedness." The court held that the petition was sufficient to give the court jurisdiction, and that the sale was valid; saying (p. 501), "in order to the exercise of jurisdiction, it is not necessary that there should be a literal compliance with the directions of the statute. A substantial compliance is enough. Nor is it essential that there should be in the petition itself, and without reference to any other paper or thing, a statement of these facts. The main fact required, is the averment of the insufficiency of the personal assets, and mere formal defects in the mode of statement would not affect the jurisdiction. The reference to the inventory makes, for all purposes of the reference, the inventory a part of the petition; the amount of the personal estate is shown by the inventory, as is also the value."

It is also to be remembered, that the application for license to sell by an administrator is unlike the application by a guardian, and is a proceeding adverse to the interests of others than the applicant or those represented by him. In such case, the heirs, to whom the real property belongs, are interested adversely to the application, as their land cannot be subjected to the payment of debts until the personalty is exhausted, and therefore there is reason for requiring a statement of facts in the petition in the one case that are unnecessary in the other. And therefore the California statute (sec. 155), substantially like the Oregon one (Or. Civ. Code, sec. 1114) provided that the petition of the administrator should state the amount of the personal estate that

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has come to his hands, and how much thereof, if any, remains undisposed of, the debts outstanding against the deceased, etc.

The second case (*Fitch v. Miller*), involved the validity of a guardian's sale, that was contested on the ground, among others, that the facts stated in the petition therefor were insufficient to give the court jurisdiction. The statute prescribing what the petition should contain, was substantially the same as the Oregon one. (Sec. 6, *supra*.)

The petition was held sufficient, the court saying (p. 383), that it was only necessary to state the "condition" of the ward's estate so as to enable the court to judge whether a sale was necessary or expedient for the purposes permitted.

In this case the verified exhibit or sale bill, filed July 5, 1865, was introduced in evidence by the defendant upon the theory that, being a part of the files of the case when the court granted the license to sell, this court ought to assume that the facts contained in it were known to the county court, and taken into consideration by it in acting upon the petition.

From it, it appears that at the time of the application for license to sell, the personal property belonging to the estate had been sold, and that the proceeds, together with the sums collected on debts and rents due the estate, amounted to one thousand nine hundred and twenty-eight dollars and thirty-one cents, and that there had been paid out on account of the estate, not including six hundred and thirty-two dollars charged for guardian's services, the sum of one thousand eight hundred and nineteen dollars and ninety cents. Taking this exhibit as a part of the petition, there can be no doubt but that it appeared therefrom that the personal property was exhausted. But in *Gregory v. Taber*, 19 Cal. 409, it was held that an inventory or other paper on file in the matter of an estate, and not referred to in the petition, could not be considered a part of it.

It may be admitted that the petition in this case did not sufficiently set forth the "condition" of the ward's estate, and that it would have been held bad on demurrer. To do this, the petition should have stated of what the estate

The defendant by his answer denies the allegations of the complaint, as to the ownership of the premises and the plaintiff's right to the possession thereof, and pleads title in himself and a former adjudication.

The case was tried before the district judge with a jury, who, under the direction of the court, found a verdict for the defendant.

Thereupon the plaintiff moved for a new trial, which was argued before the circuit and district judge and taken under advisement.

On the trial, the plaintiff gave evidence tending to prove that one William Fulton, in his life-time, was the owner of the premises, and that he died intestate in 1876, leaving a niece and nephew—the plaintiff and said Levins—as his sole heirs at law, who thereupon became, and still are, entitled to the possession of the same.

In support of the plea of former adjudication, the defendant offered in evidence the judgment roll of an action brought on February 29, 1875, in the circuit court of the state, for Polk county, by the guardian of said William Fulton, then an insane person, against the defendant herein, to recover the possession of said premises, in which there was a verdict for the defendant, in December, 1875, and a judgment entered thereon, on May 14, 1879, as and for December 10, 1875, and some years after the death of said Fulton, which, upon the objection of the plaintiff, was excluded from the jury, on the ground that the court had no authority to order the entry of said judgment *nunc pro tunc*, because: 1. There was then no plaintiff in the action; and 2. The term at which the judgment should have been entered had passed by. (See Or. Civ. Code, secs. 262, 265.)

The defendant then gave in evidence, against the objections of the plaintiff, certified copies of a petition of J. L. Collins, to the county court of Polk county, and filed therein on February 2, 1863, alleging that said Fulton “is laboring under mental derangement” and “suffering from neglect,” and asking the court “to inquire into the matter” and dispose of it according to the act of September 27,

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1862, entitled, "An act to provide for the safe keeping and treatment of insane and idiotic persons," and the proceedings thereon, from which it appears that said Fulton was by order of said court brought before it, by the sheriff, on March 3, 1863, and upon the evidence of David Pyle, a physician, that he was "an insane person," was sent to the insane asylum, at Portland, where he was received on March 4, 1863; and certified copies of the application of David W. Allingham, on March 7, 1863, to be appointed guardian of said Fulton and the order thereon of the same date, appointing said Allingham guardian of the estate of said Fulton, in which it is recited that the latter had "been duly convicted of insanity and sent to the insane asylum, at Portland," the oath of said Allingham, as guardian, dated April 7th, his bond dated April 25th and filed May 4th, the letters of guardianship issued to him on May 4, 1863, and the exhibit of the estate verified and filed July 5, 1865; and certified copies of the petition of said guardian to said county court to sell the real property of said Fulton, verified and filed on October 2, 1866, in which it is alleged "that said Fulton is an insane person now confined to the insane asylum of the state of Oregon; that the personal property of the said Fulton is not sufficient to pay expenses accruing in consequence of the necessary care and treatment of the said Fulton; that as there is but little hope of the recovery of said Fulton from his insanity, if the sale of the said lands should be more than sufficient to meet the wants of the said Fulton while insane, the money put at interest will ultimately be of greater value to the said Fulton in any event than the real estate;" the order setting the petition for hearing on November 6th, and directing notice thereof to be given by publication for three weeks, to all persons interested, the order dated November 7th, allowing the sale, wherein it is stated that "it appearing to the court that it would be for the best interest of said ward to sell the" real property belonging to said Fulton, it is ordered that said guardian sell the same as by law required, describing, among others, the premises in controversy by metes and bounds; the oath of the guardian of the same date to dis-

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By the Court, DEADY, J. On August 29, 1879, the plaintiff commenced a suit against William C. and Jane O. Griswold and others, the defendants herein, which upon a demurrer for multifariousness was dismissed, as to said Jane O., and the plaintiff allowed to file an amended bill against the remainder of the defendants, which was done on January 9, 1880.

From the amended bill it appears, that on and prior to May 27, 1877, the defendant, William C. Griswold, was the owner in fee of certain real property, situate in Salem, Oregon, including block 18, known as "the agricultural works" and "Griswold's water works," and lots 1, 2, 3, and 4, in block 36, with the water power and appurtenances; lot 8 in block 10; and the west half of lots 1, 2, 3, and 4, in block 73; and that on said day the plaintiff by B. F. Dowell, informant, commenced an action in the United States district court for this district, under sections 3490 and 5438 of the revised statutes, against said defendant, to recover about seventeen thousand dollars wrongfully obtained by him on January 29, 1874, from the treasury of the United States, by means of false vouchers and affidavits, together with the damages and forfeitures allowed therefor, as provided in said sections, amounting in all, as claimed in the amended complaint, to the sum of one hundred and forty-three thousand dollars; in which the plaintiff, on December 14, 1878, had a verdict for thirty-five thousand two hundred and twenty-eight dollars, and on January 11, 1879, obtained a judgment thereon for that amount, and two thousand four hundred dollars costs.

On April 22, 1879, said judgment was, on error to this court, reversed, and the cause remanded for a new trial, in which the plaintiff, on July 30, 1879, had judgment again for thirty-five thousand two hundred and twenty-eight dollars and two thousand eight hundred and twenty-one dollars and sixty cents costs, which was on the same day duly docketed in the lien docket of that court, and became and is a lien upon the real property of said defendant, in Oregon. Afterwards, an execution issued to enforce said judgment, which was levied by the marshal of the district upon the

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real property aforesaid and upon certain other property of the defendant Griswold, situate in Salem, from the sale of which last mentioned, the sum of one hundred and seventy-four dollars was realized, and the writ returned on November 17, 1879—"no other property found in this district"—and the remainder of said judgment is still unsatisfied. On June 11, 1877, said Griswold borrowed of the defendants William S. Ladd and Asahel Bush the sum of three thousand five hundred dollars, to secure the payment of which with interest, he gave them a mortgage on said block 18 for the sum of ten thousand dollars, bearing date June 4, 1877, and on June 4, 1878, said Griswold mortgaged said block 18 and said lots 1, 2, 3, and 4, in block 36, with the water power and appurtenances, to the defendants, W. Lair Hill, George H. Durham, and H. Y. Thompson, to secure the payment to them of his note for ten thousand dollars, given as a fee for defending the action aforesaid against him. On December 18, 1878, Griswold mortgaged said lot 8 in block 10 to Ladd & Bush to secure the payment to them of a debt of three hundred and six dollars and twenty-five cents with interest thereon.

On January 6, 1879, Griswold voluntarily appeared and confessed judgments in the county court of Marion county in favor of Ladd & Bush for three hundred and forty-eight dollars and eighty-two cents, and the defendants A. Kelly, Thomas A. Mauzy, W. G. Woodworth, William H. Watkins, Benjamin Hayden, William H. Holmes, and James W. Nesmith for the aggregate sum of three thousand two hundred and twenty-three dollars and thirteen cents.

On January 7, 1879, Hill, Durham, and Thompson commenced a suit in the circuit court for the county of Marion to foreclose their mortgage, and made the defendants Griswold and L. & B. and the other persons to whom judgments were confessed as aforesaid defendants; in which, on February 11, 1879, there was a decree given that L. & B. recover of the defendant Griswold the sum of three thousand eight hundred and sixteen dollars and sixteen cents, and H., D., and T. the sum of nine thousand three hundred and sixty-five dollars and forty-two cents, the balance due on

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pose of the property "as will be most for the advantage of all persons interested therein;" the bond of said guardian in the penal sum of ten thousand dollars, conditioned to sell such property and account for the proceeds of the sale as provided by law, dated January 7, 1867, and filed March 11th. The certificate of the sheriff of said county filed on February 6th, stating that the premises were sold by him "at the instance of said guardian, on January 8, 1867, to Alexander Hodges, he being the highest bidder therefor, for nine hundred and sixty dollars in gold coin, payable in five years, with interest at the rate of 12 per cent. per annum, payable in advance, and secured by mortgage on the premises; and the order of said court dated February 7, 1867, confirming said sale and directing the guardian to execute a conveyance thereof to the purchaser. The guardian conveyed to Hodges on March 11, 1867, who, on October 10, 1870, conveyed the north half of the premises to J. S. Bevens, and the south half to M. R. Davis, who afterwards conveyed to the defendant—the latter on October 26, 1871, and the former on December 7, 1872.

The first point made by the plaintiff in support of the motion for a new trial is, that the court erred in admitting the copies of the proceedings upon the inquisition of lunacy, because the originals were void, not having been kept and entered in the proper book. To understand this objection it is necessary to premise that the county court "has the jurisdiction pertaining to probate courts and boards of county commissioners, * * * and such civil jurisdiction not exceeding the amount of value of five hundred dollars * * * as may be prescribed by law" (Con., art. VII, sec. 12); and by section 876 of the civil code, it is provided that these three kinds of business, to wit, 1. Cases at law; 2. Probate business; and, 3. County business, "shall be entered and kept in separate books;" and the argument of the plaintiff is that these orders belong to probate business, but have been entered in the book with county business, and are therefore void.

ment assumes that said section 876 was in force transactions took place. But this is a mistake.

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The civil code, although passed on October 11, 1862, did not take effect until June 1, 1863. But upon examination we find that substantially the same provision concerning "the settlement of the estates of minors, idiots, and lunatics, and all cases of the nature of probate," and "all county business," was contained in section 21 of the act of June 4, 1859, relating to county courts (Sess. Laws, p. 12), and then and until June 1, 1863, in force and applicable to these proceedings.

It does not appear from the certificate of the clerk to these copies—dated October 13, 1874—that the originals were not entered in a separate book. On the contrary, the fair inference from the certificate is that they were so kept. The clerk describes himself as "the keeper of the probate records," and then certifies that the transcript is a true copy of the original orders made by the court in the "commitment" and estate of William Fulton. But on the hearing of the motion for a new trial the plaintiff read a duly certified transcript, dated March 11, 1881, of the whole record of the proceedings of the county court for the months of February and March, 1863, doing county business, in which is found the entry of the proceedings upon the inquisition of lunacy in the case of William Fulton, to which is added in the certificate, the statement that no entry concerning such inquisition is found in the record of probate business.

Assuming that this is sufficient evidence of the fact that the proceedings on the inquisition of lunacy were kept in the record of county business and not that of probate business, and that the plaintiff is excusable for not producing such evidence on the trial if he deemed it material, what is the effect of it?

At the date of the act of June 4, 1859, *supra*, and until September 27, 1862, there was no insane asylum in this state, and a county court had no authority to make or hold an inquisition of lunacy except for the purpose of appointing a guardian of the lunatic's person and estate upon the application in writing of certain persons named. (Act of Dec. 15, 1853, secs. 9, 10; Or. Laws, p. 555.)

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On September 27, 1862, an act was passed “to provide for the safe keeping of insane and idiotic persons.”

Section 1 of this act authorized the governor to contract with “some suitable person” for the safe keeping of the insane. Section 2 was merely a rehash of the law then in force authorizing the county court to appoint a guardian for the person and estate of a lunatic, without any reference to it. Section 3 authorized “the county *judge* of any county * * * upon the *application* of any citizen *in writing*,” stating that any person “is suffering under mental derangement,” to cause such person “to be brought before him at such time and place as he may direct,” then and there to be examined by “one or more competent physicians,” selected by said judge. If upon such examination the physician should “certify on oath” that the person examined was insane, then the judge was required to cause such person to be placed in charge of the contractors for keeping the insane—primarily at the expense of the state; but it was also made the duty of the county judge to see that the estate of the insane person, if any, was applied to meet such expense. For the first two years the price paid was twelve dollars per week, and for the next four years ten dollars. From this it will be seen that it is doubtful to what class of business an inquisition of lunacy taken under the act of 1862 belongs. It does not come within the enumeration of the act of June 4, 1859, and was not authorized when that act was passed. It is somewhat *sui generis*. The proceeding need not be in court, but may be had before the county judge at any time or place he may name; and for aught that appears may be kept in paper and not entered in any book. In this particular case it seems the judge likened it to county business, and had the proceedings entered and kept accordingly as of a regular term of the court. But admitting that he erred in this matter and that the inquisition should have been kept and entered in the records of the probate business as claimed by the plaintiff, still the result is not affected by this mistake of the officer. The act directing the business transacted in the county court to be kept and entered in different books according to a certain classification of the same, is

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so far a mere regulation for convenience, and not of the essence of the thing to be done, and therefore only directory. When a statute gives directions or makes provisions concerning the time and manner of doing an official act, affecting the rights and duties of third persons, it will generally be considered directory unless the nature of the act to be done or the language of the statute indicates the contrary. (Smith's Com., sec. 670; Cooley's Const. Lim. 74; *Tbney v. Milbury*, 21 Pick. 67; *Corbett v. Bradley*, 7 Nev. 107; *People v. Cook*, 14 Barb. 290; S. C., 8 N. Y. 67; *Rex v. Loxdale*, 1 Burr. 447.)

In this latter case Lord Mansfield said: "There is a known distinction between circumstances which are of the *essence* of a thing required to be done by an act of parliament, and clauses merely *directory*."

In the case under consideration there is nothing in the nature of the act to be done nor the language of the statute directing it to be done, that indicates that it was the intention of the legislature to make the validity of a judgment or order of a county court duly given or made depend upon the fact that it is recorded in a particular book, and that if from the ignorance or negligence of the clerk it is entered in the wrong one, it is therefore void.

The statute requiring the proceedings in this inquisition of lunacy to be kept and entered in a particular book with a certain class of business is merely directory; and although the officer ought to have obeyed it, third persons are not to suffer for his omissions to do so: The entry of the proceedings in the records of the court was essential—the essence of the thing to be done—but whether in a book with this or that class of business was a mere matter of convenience, and the statute providing for it is therefore directory.

The plaintiff also insists that the inquisition is void, because taken upon a petition not verified—because, as counsel states it, Fulton was arrested and imprisoned in the asylum without "probable cause supported by oath or affirmation," contrary to section 9 of article I of the constitution of the state, which provides that "no warrant shall issue but upon probable cause supported by oath or

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The arrest of a person upon a charge of insanity for the purpose of his commitment or confinement in an insane asylum, is, strictly speaking, an arrest neither in a civil nor a criminal proceeding, but is one *sui generis*. Still it partakes more of the character of the latter than the former, and ought not, in this day of regard for personal liberty, to be allowed otherwise than upon information on oath. This act, which practically allows the arrest of a person upon the charge of insanity on the unverified statement of any citizen, and his commitment to the asylum upon the verified statement of any one "physician," selected by the county judge, that he is insane, was probably prepared and passed in the interest of the contractors, who naturally enough wanted the entry to the asylum made expeditious and easy.

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the latter did not wish, as he said, to incur the trouble and expense of making a new note and mortgage, it was arranged between them to use the one already prepared, by indorsing on the note a credit of even date therewith of six thousand five hundred dollars, but leaving the mortgage as it was, for the full amount, in which condition it was recorded and remained. It is probable that Griswold intended to use the excess of this mortgage over the sum really secured by it to ward off the plaintiff's claim, which he knew to be just and then in suit, but there is no evidence to warrant the conclusion that L. & B. had any object in taking the note and mortgage as they did, but to secure their loan in a manner to accommodate Griswold, or that they knew or had reason to believe that he had any ulterior purpose in the matter.

This mortgage is not affected by section 3466, *supra*, giving the United States a priority, because Griswold was not then legally a bankrupt or insolvent, and although unable to pay his debts and therefore in fact insolvent, the conveyance did not amount to or pretend to be a voluntary assignment of all his property for the benefit of his creditors, but only a security for an ordinary loan that would not even constitute an act of bankruptcy under the bankrupt law.

If it is invalid at all, it is because it is contrary to the statute of frauds (Or. Laws, p. 523, sec. 51), which is substantially a copy of 13 Eliz., c. 5, and provides, among other things, that every conveyance of any estate or interest in lands, "made with intent to hinder, delay, or defraud creditors of their lawful suits, damages, forfeitures, debts, or demands, * * * as against the persons so hindered, delayed, or defrauded, shall be void."

The "question of fraudulent intent" is made by the statute "a question of fact and not of law;" and "the fraudulent intent" of a grantor is not to affect the title of "a purchaser for a valuable consideration," without notice of such intent. (Or. Laws, *supra*, secs. 54, 55.)

The false statement of the consideration for the mortgage is a badge of fraud, but not conclusive evidence of it.

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(Bump on F. C. 33, 42.) And in this case the explanation of how it came to be and remain in the mortgage is satisfactory, so far as the mortgagees are concerned; at least we do not feel warranted in coming to the conclusion from this circumstance alone that the mortgage was understood by them to be fraudulent, as to the excess of three thousand five hundred dollars.

But when H., D., and T. sought to foreclose their mortgage on the same property, and made L. & B. defendants in their suit, the latter answered, setting up the lien of their judgment in the county court for three hundred and forty-eight dollars and eighty-two cents, and also alleged that they had a mortgage on the property for ten thousand dollars, which was then "in full force." The bill alleges that this answer was made with intent "to defraud" the plaintiff out of its debt by making it appear that L. & B. had a mortgage to secure an actual indebtedness of ten thousand dollars, instead of one for only three thousand five hundred dollars. It may be admitted that the allegation in the answer is literally true—that the mortgage was "in full force"—but nevertheless, it was calculated to make a false impression. It may have been "in full force" as a security for three thousand five hundred dollars, or because it was uncanceled or not satisfied, but not otherwise; for in fact almost two thirds of it was fictitious from the beginning, and so far never had any force. But this circumstance of itself cannot impair the validity of the mortgage, if it was otherwise valid. It is only material in this connection, as the subsequent act or conduct of one of the parties to the transaction, that may serve to throw light upon the purpose and intent with which it was originally made and received. But when it is considered that there is no other act or declaration of the mortgagees, that can be construed into an assertion or claim that this mortgage was in "force" otherwise than as security for the amount really loaned upon it—three thousand five hundred dollars—and that in the suit in which this answer was made, L. & B. only claimed and took a decree, February 11, 1879, for the sum actually due them—three thousand eight hundred and sixteen dollars and six-

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teen cents—we do not think this answer is sufficient to characterize the original transaction as fraudulent on their part. But admitting that the circumstances of the false statement of the consideration in the mortgage, and the claim in the answer that it was then “in full force,” are suspicious and not satisfactorily explained by the mortgagees, still we think it a case within the rule laid down in *Boyd v. Suydam*, 1 Johns. Ch. 478, in which it was held by Chancellor Kent, that “when a deed is sought to be set aside as voluntary and fraudulent against creditors, and there is not sufficient evidence of fraud to induce the court to avoid it absolutely, but there are suspicious circumstances as to the adequacy of the consideration and *fairness* of the transaction, the court will not set aside the conveyance altogether, but permit it to stand as a security for the sum actually paid.” (See Bump. on F. C. 288.)

The mortgage is allowed to stand as a valid lien on the property for the amount loaned thereon, with interest, less the amount paid thereon by Griswold—three hundred and twenty-five dollars and eighty cents—and the priority of the United States must be enforced subject thereto.

As to the mortgage of H., D., and T. to secure their fee of ten thousand dollars, the evidence is satisfactory that the contract was made and the mortgage taken by them in good faith for the purpose claimed.

It may be that Griswold was influenced in giving the mortgage in this amount by the consideration that he preferred to spend the property in litigation, rather than allow it to be appropriated to the payment of what he owed the plaintiff. But there is no evidence in the case to sustain the allegation, that this contract is tainted with a secret trust in favor of Griswold or any one else. The conversation between Griswold and Thompson, to which John Young testifies, wherein the latter said, that in some event they would take the case up and the former must pay them another one thousand dollars, in addition to the two thousand dollars before agreed upon, is relied on as showing directly that the fee really agreed to be paid was much less than ten thousand dollars. But though it may be claimed from the general

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drift of the witness' testimony that this conversation occurred after the making of this contract and mortgage, there is a circumstance stated in it, which plainly shows that it took place during the first trial, and of course before they were made. For Young states, that after this conversation he saw Griswold on the street, who then told him "that the jury had disagreed;" and as this only occurred on the first trial, and before the contract and mortgage were made, it follows that the conversation between Thompson and Griswold in no way conflicts with them. It is also insisted that the fee is extravagant and grossly in excess of the ordinary compensation allowed and paid for similar services in this state; and so much so, that the contract and mortgage ought to be considered and held fraudulent on that account, for all in excess of three thousand dollars.

But the weight of the testimony does not support this conclusion. Besides the services of the defendants having been rendered in the United States courts, the character and extent of them are well known to us.

The case was a very extraordinary one in many respects—involving a claim for one hundred and forty-three thousand dollars, of which about thirty-five thousand dollars for damages, and as much more for forfeitures, was well founded in fact and law; besides very grave charges against the defendant's integrity. There were three jury trials—the first one resulting in a disagreement of the jury, after being on twenty-four days; the second one occupied nineteen days, and the third one fifteen. There was a motion for a new trial, after which the case was taken to the circuit and heard there on error. The preparation and trial of the action covered a wide field of inquiry and controversy, extending over a period of nearly a quarter of a century and reaching from the Atlantic to the Pacific. The time, labor, and expense devoted to the defence of the action by all the members of the firm was unusual, and nothing was spared or omitted by them to make it successful.

The fee is admitted to be a large one—probably the largest unconditional and secured one then ever paid or promised in the state. But we do not think that there is

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5. **SAME.**—In a suit brought to set aside a conveyance to the wife as fraudulent against the creditors of the husband, it is too late upon the hearing to raise the question that such conveyance or the record of it is void because the original is not duly stamped.
6. **LIEN OF JUDGMENT AND CONVEYANCE.**—*Seemle*, that section 268 of the Oregon civil code, which declares that a conveyance of real property shall be void as against the lien of a docketed judgment unless recorded within five days from its execution, should be limited to cases where such lien was acquired in good faith—without notice of such conveyance.

Before SAWYER, Circuit Judge, and DEADY, District Judge.

Addison C. Gibbs, B. F. Dowell, and Rufus Mallory, for plaintiff.

E. C. Bronnaugh, for defendant Jane O. Griswold.

By the Court, DEADY, J. On January 29, 1880, the plaintiff commenced this suit to subject block 38, and lot 1 in block 47, in the town of Salem, and appearing on the record of deeds since February 12, 1878, as the property of the defendant, Jane O. Griswold, to the satisfaction of a judgment theretofore obtained by the United States against the defendant, William C. Griswold.

At the same time applications were made for an injunction to restrain the defendants, W. C. G. and J. O. G., from disposing of or incumbering the property or taking the rents thereof, during the pendency of this suit, which were duly allowed, the latter on February 9th, and the former on April 5th, following.

The defendants answered separately, William C. Griswold on March 1st, Asahel Bush on March 19th, and Jane O. Griswold on May 27th.

Exceptions for insufficiency and impertinence were taken to the answer of William C. Griswold, which were disallowed, except numbers 1 and 2 of the former, and as to these the answer was amended and refiled on April 7th.

Replications to the several answers were filed and testimony taken before an examiner, and upon commission, and the cause heard thereon before the circuit and district judge on April 11, 1881.

The following facts are admitted or fully proven:

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On January 29, 1874, the defendant, William C. Griswold, wrongfully collected from the treasury of the United States, by means of false and fraudulent vouchers and affidavits, the sum of sixteen thousand one hundred and fourteen dollars, and on May 27, 1877, the plaintiff, by B. F. Dowell as informer, commenced an action against said Griswold, in the district court of Oregon, under sections 3490 and 5438 of the revised statutes, to recover the damages and forfeitures given by said sections therefor, in which, on July 30, 1879, it obtained the judgment aforesaid for the sum of thirty-five thousand two hundred and twenty-eight dollars damages and forfeiture, and two thousand nine hundred dollars costs and disbursements, which was duly docketed on the same day, and thereupon became and is a lien upon all the real property of said Griswold in the state.

On September 16, 1879, an execution was issued upon said judgment against the property of the defendant therein, which was returned with one hundred and seventy-four dollars made thereon, and "no other property found in the district." Thereupon the plaintiff commenced this suit to set aside certain conveyances of said property, whereby the legal title thereto was passed from said William C. Griswold through third persons to said Jane O. Griswold, *as fraudulent*, so as to subject the same to the payment of said judgment.

As early as 1852, the defendant, W. C. G., was engaged in the mercantile business at Salem, Oregon, and so continued until 1860, about which time he removed to New York, where he made his home until since the commencement of this litigation.

On January 25, 1854, he was married to the defendant, J. O. G., at Hartford, Connecticut, who has resided in New York since about 1860.

On July 16, 1855, the defendant, W. C. G., purchased the property in question from William H. and C. A. Willson, his wife, the donees of the Salem donation claim, and in 1856 he erected a large brick building on said lot 1, since known as "Griswold's block," in which he did business while he remained in Oregon.

In 1865, and prior thereto, W. C. G. was engaged in the hat and cap business in New York, and in mercantile ventures in Texas and Tennessee, and in 1867 became embarrassed, from losses and depression in business.

On December 21, 1867, Griswold and wife conveyed the premises to James M. Adams, since dead, a liquor dealer in New York, and related to the latter in the fourth degree, for the nominal consideration of twenty-two thousand five hundred dollars, by a deed stamped with only eleven dollars and fifty cents' worth of stamps, and recorded on February 10, 1868.

On December 19, 1868, said James M. Adams conveyed the premises to Chester Adams, of Hartford, Connecticut, his uncle, a man of wealth, and a particular friend of said J. O. G., for the nominal consideration of twenty-two thousand dollars, by a deed stamped with only eleven dollars' worth of stamps, and recorded on February 1, 1869; and on December 30, 1870, the executors and beneficiaries under the will of said Chester Adams, he having died on July 6, 1870, conveyed the premises to said J. O. G. for the nominal consideration of ten thousand nine hundred and sixty-two dollars and sixty-three cents, by a deed which was not recorded until February 12, 1878.

This latter deed recites that the conveyance from James M. to Chester Adams, of December 19, 1868, though "in form absolute," was in fact "conditional," and intended by the parties thereto "as security" for the sum of nine thousand six hundred and nineteen dollars and sixty-three cents, with interest thereon from April 1, 1869, "upon the distinct and express agreement and understanding that upon payment of said sum by said J. O. G., the said Chester Adams was to grant and convey said estate to said J. O. G."

On December 31, 1868, Griswold, for the purpose of procuring a settlement or compromise with his creditors, or the principal ones of them, filed his petition in bankruptcy in the district court for the eastern district of New York, and was duly adjudged a bankrupt therein, and on November 15, 1869, received a discharge from his debts, he having in the mean time effected a settlement with his principal creditors,

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to whom he was indebted as indorser for about thirty-three and one third cents on the dollar.

On May 31, 1865, W. C. G. gave Mr. Chester N. Terry, of Salem, a power of attorney, authorizing him to act as his agent, under which he took charge of this property for about five years, collected the rents, giving receipts therefor in the name of Chester Adams after October 1, 1869, paid the taxes, and remitted the remainder to W. C. G. at New York. During this period, between 1867 and 1870, the latter visited Salem to look after the property, and while there told Terry more than once that he was financially involved in New York, and that "he had deeded the property in Salem to James M. Adams in order to protect it from his creditors in New York, and that as soon as he could arrange his affairs satisfactorily in New York he would have his Oregon property deeded back to him again." In 1870 and 1871 W. C. G. made additions to the buildings on said lot 1, at a cost exceeding five thousand dollars, which he personally superintended and paid for. After the termination of Terry's agency W. C. G. continued to manage the property, paying the taxes and receiving the rents either in person, giving receipts in his own name, and as for himself, or by his agent, Mr. J. J. Murphy, until June, 1879, since when the rents have been collected by the defendants, Ladd & Bush, bankers of Salem, in the name of J. O. G., and accounted for to her until December, 1879, from which time they have been collected by the receiver herein.

On April 13, 1878, said lot 1 was conveyed by Griswold and "J. O. G., his wife," to the board of commissioners for the sale of school lands to secure a loan of five thousand dollars, payable in one year thereafter, with interest at the rate of ten per centum per annum, which money was received by said Griswold and used in his business as his own, and still remains unpaid, except the portion of the rents applied thereon by the receiver.

From 1867 to 1878, inclusive, the premises were assessed and valued for general taxation as follows: 1867, to W. C. G., twenty-five thousand dollars; 1868 and 1869, to James M. Adams, at twenty-five thousand seven hundred dollars; in

1870, to Chester Adams, at eighteen thousand dollars; from 1871 to 1876, inclusive, to W. C. G., at from twenty-three thousand six hundred dollars to twenty-one thousand three hundred dollars; in 1877, lot 1, to Chester Adams, at nineteen thousand dollars, but block 38 to W. C. G., at one thousand five hundred dollars, and in 1878 lot 1 to J. O. G. at eighteen thousand dollars, and block 38 to W. C. G. at one thousand two hundred dollars. These valuations, according to the established usage of the country, did not exceed one half the real value of the property, and probably not more than one third.

Until some time after the commencement of this litigation it does not appear by any act or declaration of Griswold or his wife that this property was ever regarded by either of them as belonging to her, while every act and declaration of Griswold's, and particularly what he said and did while actually in possession of the premises, points unequivocally to the conclusion that he was the actual owner.

But it is contended on behalf of Mrs. Griswold that Griswold's acts and declarations, after he conveyed the legal title to James M. Adams, are inadmissible to affect her right in the premises unless assented to by her, citing, among other authorities, 2 Phil. Ev., n. 481, p. 655.

It is admitted that the general rule is, as therein stated, "that declarations, made by the person under whom the party claims, after the declarant has departed with his right, are utterly inadmissible to affect any one claiming under him."

But it is understood that this rule does not apply where the declarant has not parted with the possession as well as the title.

When the question of whether a conveyance is fraudulent or not arises between the grantee and the creditor of the grantor thereon, the creditor may always show that notwithstanding the conveyance the grantor continued in possession and control. To this end acts of the grantor implying ownership and control may be shown, and also, as a part of the *res gestæ*, the declarations accompanying such acts or possession may be proven to show the nature, extent,

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and purpose thereof. (See 2 Phil. Ev., n., *supra*, pp. 652, 654.)

In *Trotter v. Watson*, 6 Humph. 509, as stated in 1 Meigs' Dig. 549, it was held that "if a party make a deed and retain the possession of the property inconsistently with the terms of the deed, his statements in reference to the ownership or contract or terms upon which he holds the possession of the property may be received as part of the *res gestæ*. In such a case the possession of the property is a badge of fraud, which of itself connects him with the claimant in the suspicion of a confederacy to defeat creditors. His declarations, therefore, in relation to the property and the character of his possession of it, become part of the thing doing, and as such is evidence."

Greenleaf (vol. 1, section 109), after stating that there had been some difference of opinion as to the admissibility of such declarations, and that it was well settled "that declarations in disparagement of the title of the declarant are admissible as original evidence," says: "But no reason is perceived why every declaration accompanying the act of possession, whether in disparagement of the declarant's title or otherwise qualifying his possession, if made in good faith, should not be received as a part of the *res gestæ*, leaving its effect to be governed by other rules of evidence."

In *Williams v. Hart*, 10 Rep. 74, the supreme court of Georgia, 1880, held the declarations of a debtor in possession of land after a sale by the sheriff upon an execution against the declarant, to his son, to the effect that the sale was fraudulent as against creditors, admissible against the purchaser, citing with approval the rule laid down in 59 Ga. 711, that "so long as a debtor remains in possession of property which once belonged to him, and which his creditor is seeking to condemn as fraudulently conveyed, the *res gestæ* of the fraud, if any, may be considered as in progress; and his declarations, though made after he has parted with the formal paper title, may, by reason of the continuous possession which accompanied them, be given in evidence for the creditor against the claimant."

In *Cahoon v. Marshall*, 25 Cal. 202, the court, in speaking

of the declarations of the vendor after a sale, says: "This species of evidence is, as a general rule, inadmissible, and is never to be received unless it appears that the vendor's declarations were made while in possession of the property, with the knowledge or consent, expressed or implied, of the vendee, in which case their declarations made while in possession of the property * * * might be considered as of the *res gestæ*."

The rule deduced from the authorities by Bump (F. C. 569) is unqualifiedly in favor of the admissibility of the declarations. He says: "When the debtor remains in the possession of the property, his acts and declarations are competent evidence against the grantee. The possession is a part of the *res gestæ*, and the nature and character of the possession is an important point of inquiry. The acts and declarations connected with it forming a part of its attendant circumstances are collateral indications of its nature, extent, and purpose. They are admissible, not because any peculiar credit is due to the party in possession, but because they qualify and characterize the very fact to be investigated." See, also, *Potter v. McDowell*, 31 Mo. 74; Whart. Ev., sec. 263.

It may be remarked, as bearing on this question and the consideration to be given to the leaning of the earlier authorities, that with the growth of the idea, that it is better to enlarge the field of evidence, than to restrict it, the admissibility of this kind of declaration is received with increasing favor; and it is safe to affirm that there is no reason why an act tending to show ownership on the part of the vendor after sale, should be received as an item of evidence to prove the true character of the alleged fraudulent transaction, which does not equally support the admission of the declaration which accompanies it, and is to all intents and purposes a part of it.

It is also contended on behalf of the defendants, that admitting the conveyances that terminated in the one vesting the legal title to the premises in Mrs. Griswold were made with intent to hinder, delay, and defraud creditors, the United States, not being a creditor of the Griswolds until

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after that date—January 29, 1874—was not affected by the transaction, and cannot be heard to complain of it. Upon this point it is contended by the plaintiff, that Griswold's creditors, at the date of his bankruptcy, who have not since been paid in full, are his creditors still, for that his discharge was and is illegal and void, because he fraudulently omitted from his schedule the premises in controversy, and certain Indian war scrip of the value of many thousands of dollars, including one item of fifteen thousand five hundred and fifty-six dollars and fifty-nine cents, arising out of the expedition to aid the Oregon emigrants of 1854, which he had obtained from Ben. Drew, and afterwards, on April 20, 1871, collected in full from the United States, and such conveyances being void as to these then existing creditors are void also as to the subsequent ones, including the plaintiff.

But admitting all that is alleged against the integrity of the bankruptcy proceeding, as, that Griswold's discharge was fraudulently obtained for the reason stated, still the discharge is and has been in full force and effect ever since it was obtained, and is and was a valid and binding discharge from the debts then due from Griswold until set aside or annulled in a suit brought for that purpose, in the court where it was granted by an existing and injured creditor or the official assignee. It cannot be otherwise or collaterally attacked. (Sec. 5, 120, of the R. S.; *Nicholas v. Murray*, 5 Saw. 323.)

The bankruptcy of Griswold having occurred before the United States became his creditor, and the discharge therein obtained being in full force, the same may be laid out of view, except, as the fact may serve to throw light upon the motive and purpose of the conveyances to James M. and Chester Adams and the subsequent conduct of Griswold.

And the plaintiff not having become a creditor of Griswold until after the execution of these conveyances, as well as the final one to Mrs. Griswold, cannot be heard to impeach them on account of the fraudulent intent of the grantor, unless it appears they were also made with the in-

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tention to hinder, delay, or defraud subsequent creditors. (*Reade v. Livingston*, 3 Johns. Ch. 501; *Sexton v. Wheaton*, 8 Wheat. 229; 1 Story Eq. Jur., sec. 361; *Dick v. Hamilton*, 1 Deady, 329.)

The defendants, Griswold and wife, claim by their answers substantially, that in 1865, the former being quite wealthy and the owner of property in value largely in excess of his then indebtedness, gave the latter as her own property, bonds, stocks, and securities to the par value of fifty thousand dollars; that afterwards and a few months before going into bankruptcy Griswold borrowed several thousand dollars of his wife, to aid him in his financial embarrassments; that at the same time he sold the premises to said James M. Adams to enable him to pay debts and obtain money to use in his business, for, as *he* alleges, the following consideration: A debt of about one thousand dollars due from himself to J. M. A.; an agreement to pay a debt of ten thousand dollars due one S. R. Jacobs, since dead, and a debt of four thousand dollars due some one else whose name is forgotten; and ten or eleven thousand dollars in money and bonds; but in what proportion or what bonds he does not remember and cannot state; that soon after this said J. M. A. became financially embarrassed and wished to dispose of the premises at the price which it is alleged he paid for them—twenty-two thousand five hundred dollars—and she, as *she* alleges, believing that the property would appreciate in value, applied to Chester Adams, a wealthy friend, to assist her in purchasing the same, which he did, she advancing him “twelve thousand dollars or something over” of the remaining bonds given her by her husband, and the balance, nine thousand six hundred and nineteen dollars and sixty-five cents—the portion of the Jacobs debt that J. M. A. had not paid—being paid by Chester Adams, to whom the conveyance was made in trust for the wife and as a security for that sum; and that afterwards Griswold engaged in speculation, and was financially successful therein,” and repaid his wife “a considerable portion” of the money borrowed of her, out of which she paid the said sum of nine thousand six hundred and nine-

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teen dollars and sixty-five cents, with interest, to the representatives of Chester Adams, and took the conveyance of the premises from them to herself.

He denies that from the time of the sale to J. M. A. he was ever in the “actual” or “constructive” possession of the premises or claimed them as his own, but admits that since the conveyance to his wife—December 30, 1870—he has been in the actual possession and control of them as her agent.

She denies that from 1865 to February 12, 1868, Griswold had “the actual possession” of the premises or claimed the same as his own property, or that since said February 12th, he has had such possession as her agent; and alleges that the rents were collected in the name of and paid to J. M. A. while he held the legal title and until January 1, 1869, and thereafter until May or June, 1870, to said C. A., who accounted to her for them, when by his consent they were collected and paid to Griswold, who, in 1870–71, expended about five thousand two hundred dollars of them in the repairs and improvements aforesaid.

On February 12, 1879, and before the commencement of this suit, the defendant, W. C. G., was examined under oath before a commissioner of this court, under title II. of chapter 3 of the Oregon civil code, in aid of an execution, to enforce a judgment given in the action aforesaid, for damages and forfeitures on December 14, 1878, for the same amount as the subsequent one of July 30, 1879, and reversed on April 22, 1879, in which, as appears from the shorthand report of his testimony, he swore that he conveyed the premises to James M. Adams in consideration of ten or eleven thousand dollars that he owed him, upon the understanding that when the money was repaid the premises were to be conveyed to his wife; that J. M. A. wanted his money, and an arrangement was made, with his consent, by which Chester Adams advanced the sum due J. M. A. and interest, and took a conveyance of the property to himself, with the same understanding that when he was repaid he should convey the premises to Mrs. Griswold, and that

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he gave her the money to pay Chester Adams' representatives when she received the conveyance from them.

In this examination, which was long and exhaustive—reaching to four hundred and seven questions and answers—nothing was said or suggested that Griswold had ever given his wife any money, bonds, stocks, or anything else except the money paid to the representatives of Chester Adams, and he stated positively that he never held any kind of government securities except some “Oregon claim bonds,” which he sold, and that he never had any “government loan bonds,” except when he was in the hat business in the firm of Murphy & Griswold, when they used to receive them in payment of goods and dispose of them at once.

On March 25, 1879, and after the commencement of a suit similar to this to subject this property to the judgment of December 14, 1878, aforesaid, which was dismissed when said judgment was reversed, the defendant, Griswold, made an affidavit, prepared by counsel, which was offered and read in that suit by the defendant, Jane O. Griswold, upon the application of the plaintiff for the appointment of a receiver therein, in which he stated that in 1865 he was engaged in the manufacture of hats and caps in New York, and was solvent and worth one hundred and fifty thousand dollars; of which fifty thousand dollars was in stocks and bonds of the market value of thirty-five thousand dollars, that he did not need in his business, and therefore gave to his wife; but that in 1866 he engaged “with other persons in the sale of merchandise” at Galveston and Memphis, and to enable him to carry on such business “more successfully” he borrowed from his wife “the stocks and bonds aforesaid and used them” therein; that in 1867–8, “owing to the general depression in business,” he “met with heavy losses,” amounting to about one hundred and twenty-five thousand dollars, and in 1869 was compelled to go into bankruptcy; that in 1867 he was indebted to James M. Adams about six or eight thousand dollars, and sold him the premises for twenty-two thousand five hundred dollars, that being “the reasonable value” thereof, which sum was paid as follows: By the discharge of said

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indebtedness, the delivery of United States bonds of the value of ten thousand dollars, which he then transferred to his wife in part payment of the loan aforesaid, and by the payment of the balance in money; that such sale was absolute, but said J. M. A. verbally promised to allow Griswold to repurchase the property for the same price within a year if he was able, which he could not do; that in 1869 Mrs. Griswold being desirous of purchasing the property, said Chester Adams, a wealthy relative of hers, proposed to take a transfer of said ten thousand dollars of United States bonds, and advancing the balance, buy the same on her account and take the title in his own name and hold it as a security for the advance, which was done; that afterwards said advance, amounting to about nine thousand six hundred dollars, was repaid by her to the executors of said C. A., who thereupon conveyed the premises to her, and that ever since she has been, and is, the owner of the same, and entitled to, and has received, the rents and profits thereof; and at no time since the said sale to J. M. A., "have I ever had any claim upon, or interest in, said property, or exercised any control over the same" except as agent of the owners; that during the time said property was owned by said J. M. A. and C. A. respectively as aforesaid, they had the possession of the same, and received the rents and profits thereof from their agent, Chester N. Terry, and that at the time the "property was conveyed to my said wife, I had no thought of taking the benefit of the bankrupt act."

In an affidavit made by the defendant, W. C. G., in this litigation, on December 12, 1879, he stated that he filed his petition in bankruptcy in May, 1869, which he had no thought of doing until a few months before, when the failure of Sanger & Co., for whom he was indorser to a very large amount, compelled him to go into bankruptcy and was the sole cause thereof.

On November 6, 1879, the defendant, Jane O. Griswold, made and filed an affidavit in this case upon the application for the appointment of a receiver, in which she stated, that in 1865, while visiting at Hartford, Conn., and while she

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believed her husband was worth more than one hundred and fifty thousand dollars, he gave her "a quantity of stocks and United States bonds and other securities of the par value of fifty thousand dollars;" that "during the years succeeding 1865" her "husband became embarrassed and frequently borrowed" from her, and within a year or so after said gift informed her that he would be compelled to sell the premises; that he did sell the same to said J. M. A., for which "money and bonds and other securities were paid to my husband by said Adams to the amount of twenty-two thousand five hundred dollars," in her presence, at the time of signing the deed, less the amount the former owed the latter; that about a year afterwards she heard that the said J. M. A. was anxious to sell the premises at the same price he gave for them, and knowing that her husband had always regretted that he had been compelled to sell the property, and "at a sacrifice," "I was therefore anxious, if it were possible so to do, to purchase the said property, knowing I could *please* my husband by so doing, and at the same time secure a judicious investment," and learning that "all cash was required," and "not having at the time enough money or bonds" with which to make the purchase, and being in Hartford, "I applied to Chester Adams, who was a man of means and a person whom I had known for years, and whom I regarded as a friend," and asked him to purchase the property, which "after consideration he agreed to do"—advancing what was necessary for that purpose in addition to "the bonds and other securities" given him by the affiant, and taking the conveyance to himself; that it was then agreed between said C. A. and affiant that he was "to collect the income" of the property and "apply it on account of the money he had advanced," for which she was to pay him ten per centum interest, and when fully reimbursed for his advances he was to give her "the deed to said property;" and that she or her "agent" paid said C. A., at different times, "the whole of the purchase price—twenty-two thousand five hundred dollars—for said property, the last payment being made some years afterwards,"

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but at what "date" she "cannot specify positively," when the deed was delivered to her.

The defendants read the depositions of three witnesses in New York, from which it appears that they were creditors and friends of Griswold's when he went into bankruptcy, and that he has since paid them in full; that they then knew of the sale to J. M. A. and that the other creditors did, but upon the latter point their knowledge is very indefinite and wholly negative and entitled to but little weight. One of them, who was in the employ of Griswold, was present when the sale to J. M. A. was consummated and the deed delivered, and from the proceeds he received "some money" that Griswold owed him. Griswold objected to the stamp on the deed as being of greater value than was necessary, but the witness and another person present who was "waiting for money from the same source" volunteered to pay for the stamp, and this trouble was obviated. Another, the junior partner of the lawyer in whose office the conveyance was prepared, states that Mrs. Griswold once left at his office thirteen one thousand dollar United States bonds, while endeavoring to effect, as she said, the repurchase of the premises from J. M. A., but afterwards took them away, saying she was going to get Chester Adams to make the purchase for her.

In brief, the case made by the plaintiff is an apparent sale by a man in business of a valuable property to a relative of his wife's, for much less than its actual value, with a promise on the part of the vendee to allow the vendor to repurchase at the same price within a year, which was accomplished substantially within the time, by another relative and particular friend of the wife's, taking a conveyance of it to hold for her, until he was paid his advance; that at the date of the alleged sale the vendor was financially embarrassed, and in a year and ten days thereafter went into bankruptcy, and within a year and six weeks from his discharge in bankruptcy, a conveyance of the property is made to his wife in pursuance of the understanding with the grantee in the second conveyance, upon the payment by her of less than half of the nominal consideration of the original con-

veyance by the husband, and during all this time and down to 1878, the vendor remains in the possession and control of the property and takes the rents and profits as his own, and as though there had been no real change of ownership.

The explanation offered by the defendants is vague, indefinite, and improbable, and in essential particulars full of palpable and inexplicable contradictions, and leaves no room to doubt that from the beginning to the end the transaction was at least a contrivance to hinder, delay, and defraud the existing creditors of William C. Griswold, and that having gotten a discharge in bankruptcy from the debts due them, he furnished the money—ten thousand nine hundred and sixty-two dollars and sixty-three cents—to procure the conveyance from the executors of Chester Adams, to his wife, in trust for himself, thinking, probably, that it was still safer in her name than in his own.

Griswold has been for many years extensively engaged in the mercantile and manufacturing business, from which it may be reasonably inferred that he was in the habit of keeping ordinary books of account. Yet he has not dared or been able to show or offered to show a single charge, entry, or memorandum relating to this transaction or any part of it.

Upon his first examination he was silent concerning this gift of fifty thousand dollars to his wife, but said substantially and positively that he never had any bonds to give her. If true, had he forgotten that in 1865 he gave his wife a third of his fortune, although he got it back within a year? Certainly not. He then said that the consideration for the conveyance to J. M. A. was only about eleven thousand dollars, and that the conveyance to C. A. was upon exactly the same consideration from the latter to the former.

In Griswold's affidavit of March 25, 1879, we first hear of this munificent and extraordinary gift from a man in active business to his wife, for no reason whatever but the pure pleasure of giving. But of what "stocks and bonds" it consisted, what their number and denomination, when and where payable and with what interest, when and where obtained, and with whom deposited, is not even hinted at.

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Indeed, this convenient and serviceable gift comes upon the scene with as little note of preparation or air of probability, as if it were a story taken from the Arabian Nights.

But according to this statement, within a year he got back all these stocks and bonds to enable him to carry on his business "more successfully;" while his wife states in her affidavit that he became embarrassed and "frequently borrowed" of her, and in her answer, that he borrowed "many thousand dollars" of her "to assist him in extricating himself from his financial embarrassments."

But upon this point it is unnecessary to discuss the evidence further. After a careful study of it, it seems impossible that this story of the gift to the wife in 1865 can be true; and upon this incredible and uncorroborated assertion of the defendants rests the whole fabric of the defense—that the premises belong to the wife.

It may be, and is probably true, that the conveyance to J. M. A. was not without some consideration; but it is not at all probable that this consideration was more than eleven thousand five hundred dollars, the sum for which the deed was duly stamped, as the grantee, it may be presumed, would not accept a conveyance stamped for less than the actual consideration of it. And it may be that the conveyance was made for this consideration, subject to the alleged mortgage of Jacobs, of October 9, 1867, for twelve thousand dollars. But even then it follows, that eleven thousand five hundred dollars of the nominal consideration of the conveyance is fictitious. The reason for this is apparent, and coincides with the theory that the controlling purpose of this conveyance was to put the premises, or a substantial interest in them, beyond the reach of Griswold's New York creditors. In 1867, the year of the conveyance to J. M. A., this property was assessed for general taxation at twenty-five thousand dollars, and must, therefore, have been considered worth at least from forty thousand dollars to fifty thousand dollars.

To make, then, the consideration in the conveyance to J. M. A. appear at all adequate, even assuming that it was made subject to the alleged Jacobs mortgage, it was neces-

sary to put it up to at least twenty-two thousand five hundred dollars.

But there is no evidence as to the consideration of the Jacobs mortgage, except Griswold's statement and what appears upon the face of the instrument. A certified copy of the record of it, made December 2, 1867, was put in evidence by the defendant, which has "the like force and effect" as the original (Or. Laws, p. 518, sec. 27), and is *prima facie* evidence of the facts stated therein. In it the consideration is stated at twelve thousand dollars, but, under the circumstances, this statement is entitled to but little weight. (Bump, F. C. 575.)

In his answer, Griswold states, that the debt due Jacobs was "some ten thousand dollars;" and in his deposition, that the mortgage to him was twelve thousand dollars, and that, when he made his answer, he had forgotten there was a mortgage. But on the face of the deed it appears that it was only stamped for a consideration of six thousand dollars, which fact is itself sufficient to overcome the bare recital in the deed, and prove that the consideration did not exceed that amount. Indeed, when we consider that there is no attempt to show, not even by the oath of W. C. G., how this alleged indebtedness to Jacobs arose, it is extremely doubtful if there was ever any actual consideration for the mortgage to him.

But be this as it may, the conveyance to J. M. A., as between the parties, was only intended as a security for the money advanced or indebtedness discharged, and the property was to be held by the grantee in trust for Griswold.

And whatever amount was paid in the process of substituting C. A. as creditor and trustee in place of J. M. A., and for the final conveyance to J. O. G., there can be no doubt but that the husband gave the direction and furnished the money, and, therefore, the wife now holds the property in trust for him.

The question of whether the conveyances to J. M. A., C. A., and J. O. G., were made with a fraudulent intent, "is one of fact and not law." (Or. Laws, sec. 54.) There can be no doubt that such was the intention, so far as the exist-

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ing creditors were concerned; but there is nothing to show that they were made with such specific intention, so far as the plaintiff is concerned; while the reasonable inference is, that the final conveyance to the wife was procured by the husband with the intent to put the property beyond the reach of his creditors, existing or subsequent.

But the conveyance to the wife by C. A., being made upon a consideration moving from the husband, she took the property in trust for him, and a court of equity will disregard such device and subject it to the claims of the husband's creditors, arising at any time during the existence of the trust or continuance of the device, as fully as though it stood in his own name. (*Doyle v. Sleeper*, 1 Dana, 536.)

In this view of the matter, the only remaining inquiry is, was the conveyance to the wife intended at the time by Griswold as a gift to or post-nuptial settlement on her, or was it merely a convenient device for putting the property where he might enjoy the benefit of it without the risk of admitted ownership—the liability of its being taken to satisfy his creditors, existing or subsequent?

At the date of the conveyance, Griswold having been discharged from his debts incurred prior to his bankruptcy, and none others appearing to have been then contracted, the conveyance to her of the property as an actual gift or settlement would be valid as against his subsequent creditors—such as the plaintiff. And the absence of anything to the contrary—in a case free from suspicion, the proper inference would be that the wife took the property absolutely for herself, according to the terms of the conveyance. (*Dick v. Hamilton*, 1 Deady, 329.)

But it is not claimed on the part of the defendants that the consideration for this conveyance was a present gift to the wife, but only that it was the payment of a prior debt due from the husband to her, the existence of which is not only not proven, but actually disproved.

But this is not all; the evidence is more than convincing that the wife's name has been used in this matter by Griswold from the beginning simply as a convenience and pro-

tection against contingencies that are liable to occur in the life of a speculating adventurer, without actually letting go his hold upon the premises, and that the possession, control, and enjoyment of the same have remained with him, with her knowledge and consent, as completely as though the conveyance from C. A. had been made directly to himself.

The unexplained failure to put the deed to the wife on the record for nearly eight years after it was made, and the fact that it was not made public and recorded until the probable effect of this litigation rendered it convenient to assert that the property was hers; the declarations of Griswold to his confidential agent, Mr. Chester N. Terry, a witness whose long and favorably known residence in this state the court must take notice of, to the effect that the property was in fact his own; that it had been put into the names of the Adamses merely to ward off the claims of his New York creditors, and that he expected to get it into his own hands soon; the failure on the part of the husband and wife to give a credible or consistent account of the transaction, and the many gross and palpable contradictions and absurdities in the ones given by the former, all point with certainty to the conclusion that the conveyance to the wife was procured by the husband upon a consideration moving from himself and for his own benefit.

The plaintiff also insists that the conveyances to C. A. and J. O. G. were not legally acknowledged, and therefore are not entitled to record, and that for this reason they are void as against the lien of its judgment, irrespective of the intent or consideration with or upon which they were made. In support of this proposition section 268 of the civil code is cited, which provides in effect that a conveyance is void as against the lien of a judgment unless recorded within five days of its execution, as provided between conveyances of the same property in section 26 of the chapter on conveyances. (Or. Laws, 518.)

The conclusion already reached makes it unnecessary to pass upon this question. But as the conveyance to J. M. A. is legal in form and duly acknowledged and recorded,

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and therefore passed the legal title from W. C. G. to the former, the lien of the judgment afterwards obtained by the plaintiff against the latter could not affect the premises, and therefore there is no case for the application of said section 268. (See *In re Estes*, 6 Saw. 459.)

It is also claimed by the plaintiff that the conveyances in question are all insufficiently stamped and are therefore void. As the court has found otherwise, because the stamps placed upon them were sufficient for the actual "consideration" upon which they were made, it is not necessary to decide the questions made in this connection.

But it may be properly suggested that the provision of the internal revenue act of June 30, 1864 (13 Stat. 293, sec. 158), which declares that a conveyance not duly stamped "shall be deemed invalid and of no effect," applies only to cases where the proper stamp is omitted, "with intent to evade the provisions" of the act, with intent to defraud the government of the stamp duty, and such fraudulent omission must be alleged where it is sought to set aside or avoid a conveyance on this account, or shown on the trial if the question arises on the evidence. (*Campbell v. Wilcox*, 10 Wall. 421.)

The pleadings in this case are silent on the subject. If the plaintiff intended to attack the validity of these conveyances on this ground, he should have made the proper averments in his bill. Neither was the question made upon the production and proof of the record of the conveyances before the examiner.

But the revenue act (13 Stat., sec. 152), also declares "that it shall not be lawful to record" a conveyance not properly stamped; and the record thereof "shall be utterly void," and "shall not be used in evidence" without reference to the intent or circumstances with or under which the stamp was omitted.

The record of these conveyances, except the one to Jacobs, was introduced by the plaintiff, and the latter was introduced by the defendant, without objection on this ground, and it is too late to object on the hearing that the originals are not sufficiently stamped.

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Besides, admitting that the record of the conveyance to J. M. A. is void, because the original is not sufficiently stamped, it does not follow that the original is void also, for that depends upon the intent of the party making the deed; nor are we prepared to say that the lien of the plaintiff's judgment would prevail over this unrecorded conveyance, if otherwise valid, under the operation of section 268 aforesaid, unless it also appeared that such lien was taken or acquired in good faith, without knowledge or notice of such prior unrecorded conveyance.

Upon this point the plaintiff cites *Reed v. Heirs of Austin*, 9 Mo. 722; *Frothingham v. Stacker*, 11 Id. 77; *Davis v. Owensby*, 14 Id. 170. But these cases turn upon the peculiar statute of that state, and do not, as will be seen by reference to *Davis v. Owensby*, 177, prefer the lien of a judgment to the prior unrecorded deed, but only the deed of the purchaser at the sale on the execution to enforce said judgment.

In equity a judgment creditor has not been regarded as a purchaser in the sense of a rule which prefers the right of a *bona fide* purchaser for a valuable consideration to a prior title under an unregistered deed. (Story's Eq. Jur., secs. 1502, 1503 a.)

The fact that the conveyance of a subsequent purchaser, though first recorded, is not allowed by the analogous section 26 aforesaid to prevail over that of a prior purchaser, unless obtained in good faith, is a good reason why a court of equity, in administering and construing said section 268, should presume that the legislature in enacting it did not intend to make a conveyance void as against a subsequent judgment lien, unless the latter was also acquired in good faith.

As to the defendant Bush, there is no equity in the bill. Admitting all that the plaintiff claims, it was not entitled to the rents and profits before the filing of the bill and the appointment of the receiver. The judgment and lien of the plaintiff only gave it the right to sell the property free from any subsequent incumbrances, and to apply the proceeds on

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its debt. Ordinarily, the rents and profits prior the sale on a judgment, do not belong to the judgment creditor, nor are they in any way affected by the lien of it.

In this case, the legal title being in the wife in trust for the husband and judgment debtor, the plaintiff is compelled to resort to a suit in equity to subject the property to its judgment, and for this reason may claim the rents and profits from the commencement of its suit as a compensation for the delay in enforcing the judgment caused by the defendant putting his property into his wife's hands.

It appears that Mr. Bush collected the rents of the property from June 11, 1879, until December 1, 1879, amounting to two thousand six hundred and eight dollars, as the agent of Mrs. Griswold, all of which is accounted for as disbursed for taxes, repairs, one thousand seven hundred and twenty-three dollars and thirty-four cents paid to Griswold by order of Mrs. Griswold, and four hundred and fifty-nine dollars and twenty-five cents on hand, subject to a charge of thirty-two dollars and twenty-three cents commissions.

There must be a decree dismissing the bill as to the defendant Bush, and declaring that Jane O. Griswold holds the legal title of the premises as the trustee and for the benefit of her husband, and that the master sell the premises as upon execution and subject to the lien of the said mortgage to the board of school land commissioners, and apply the proceeds upon the judgment of the plaintiff, less the costs of sale.

SAWYER, C. J., concurring. For direct evidence to establish the contested facts in this case, we are compelled to rely mainly on the testimony derived from the defendants, Griswold and wife, themselves. The other testimony chiefly bears upon the probabilities or improbabilities of their various conflicting statements, and tends to show their acts in regard to, and their dealings with, the subject-matter of the contest from the date of the conveyance to J. M. Adams till the present litigation was moved. From the various conflicting statements, alone, of these defendants, made at dif-

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ferent times, unillustrated by the surrounding circumstances and their acts constituting a part of the *res gestæ*, shown in part by other evidence, it would be difficult to arrive at any satisfactory conclusion upon the facts at issue. Whatever the purpose and character of the first conveyance from Griswold and wife to J. M. Adams, as between themselves, may have been, I am satisfied, after a careful examination and consideration of all the evidence in the light of the attending circumstances, and the whole course of dealing with the property, that all moneys used to obtain a reconveyance of the title, were furnished by W. C. Griswold, out of his own funds and on his own account; that the title was taken and held in the name of Chester Adams, and, subsequently, of Mrs. Griswold, his wife, for his own use and purposes; that the property and its revenues have been in fact as absolutely under his dominion and control, as if the legal title had stood in him; that neither the property nor the funds that went into it, were ever in good faith given to Mrs. Griswold by her husband to really and substantially hold, control, and enjoy as her own sole and separate estate; but, on the contrary, that the legal title, with her consent and co-operation, was placed in her, and so held and employed for defendant W. C. Griswold's own uses and purposes; and, although the legal title stands in the name of Mrs. Griswold, that she holds it understandingly, in trust for the use and benefit of her husband, in whom has ever been in fact the actual control and beneficial use, until it was likely to become liable to be subjected to the satisfaction of the claim of the complainant against the defendant, W. C. Griswold, now in judgment.

At the time of the transaction by which the title was passed to Chester Adams for the benefit, as is claimed, of the wife, Griswold was, at least, insolvent, and on the eve of bankruptcy; for within two weeks afterwards his petition in bankruptcy was filed.

It is highly probable, also, from the course and character of events, that he was either embarrassed, or that he foresaw approaching embarrassment, at the time of the prior conveyance to James M. Adams. Upon a consideration of

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all the circumstances appearing in the case, it is difficult to believe that these transactions, and especially the arrangement with Chester Adams and subsequent conveyance to Mrs. Griswold, were not made in actual intentional fraud of the rights of then existing creditors; and although it is not probable that at the time of the conveyance to Chester Adams, or even when the title was, subsequently, transferred by his representatives to Mrs. Griswold upon payment of the amount due to Chester Adams' estate out of funds furnished by Griswold to his wife, Griswold specially contemplated by that means defeating the collection of the present indebtedness to complainant, which did not then exist; yet I cannot resist the conclusion, that the legal title was given that direction with the intent to protect the property, especially from any demands then existing, and generally from any that might thereafter arise out of the operations and speculations in which Griswold was engaged, or in which he might thereafter engage, until he should again fully recover his lost sound financial position. All the circumstances justify the belief that these transactions were originally made, and the trusts so established afterwards kept continuously on foot for the very purpose of putting and keeping the funds used, in a position, where the property and its income would be subject to Griswold's control and enjoyment, without being subjected to the payment of his existing debts, or to the risks of his subsequent speculative operations; or, in other words, for the purpose of putting himself in the position described by Mr. Justice Swayne, as "a settler purposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chances of those adverse results to which all business enterprises are liable." (*Smith v. Vodge*, 92 U. S. 183.) From Griswold's own statements at various times, and to different persons, disclosed in the testimony, it would seem that he had not at any time since his bankruptcy up to the moving of this controversy considered himself to be in a position to safely take and hold this property in his own name; but that he contemplated doing so when the proper time should come.

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The moneys which the complainant is now seeking to recover were obtained by Griswold through deliberate frauds in presenting to, and procuring payment from, the United States, of false and unfounded claims. It does not appear at what time these fraudulent practices first commenced, but the defendant, Griswold, seems to have been engaged in the business of purchasing and collecting claims against the government before the occurrence of the transactions under consideration. A party who could knowingly and deliberately obtain moneys by means of fraudulent practices, such as those resorted to by Griswold in obtaining the moneys covered by the judgment upon which this suit is based, is, certainly, capable of resorting to fraudulent practices to cover up and protect property already acquired. The whole atmosphere surrounding the transactions now in question is deeply tainted with fraud; and this condition of things tends to render a dishonest purpose highly probable in the pretended gift of Griswold to his wife.

The maxim *noscitur a sociis* may well be applied to this voluntary settlement.

Could I be satisfied, as I should be glad to be, that the property in question was purchased by Mrs. Griswold, with her own separate funds, even though such funds had been settled upon her by her husband, provided they were settled in good faith, as her sole and separate property at a time and under circumstances which would legally justify such settlement, it would be my duty and pleasure, as a judge of this court, to protect her in its ownership and enjoyment. But in this instance the evidence does not appear to present such a case. The theory of the defense relied on, and the testimony and answers of Griswold and wife to support it, in view of all the testimony cannot be accepted as entirely true.

There are remarkable, and to my mind, irreconcilable discrepancies in the several statements of W. C. Griswold, made under oath at different times, as to the consideration, purpose, and character of the conveyances, first to J. M. Adams, and from him to Chester Adams, and as to the bonds, claims, etc., in regard to which he was called upon

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to testify. Changes in the circumstances seem to have developed new recollections, and new views; and the theory now relied on does not seem to have been fully developed till demanded by the exigencies of the defense of the present suit.

The exact truth in regard to these matters can be approximated only by considering every part of these statements, conflicting and otherwise, in the light of all surrounding and attending circumstances. This I have carefully attempted to do, with the result already announced. Much might be said to support and illustrate the conclusions reached, but I do not deem it necessary, nor would it be profitable to again go over the field already so well covered by my associate.

On the grounds indicated, I think the complainant entitled to the decree ordered, and I do not deem it necessary or advisable to discuss or to express any opinions upon the other points relating to stamps, defective acknowledgments, records, etc., argued by counsel.

ELI RICE v. MARTIN & CLARK, DEFENDANTS; D.
A. BENDER & CO. ET AL., INTERVENORS.

CIRCUIT COURT, DISTRICT OF NEVADA.

AUGUST 15, 1881.

1. PARTY AS WITNESS WHEN OPPOSITE PARTY DEAD.—In the courts of the United States there can be no exclusion of a witness on the ground of interest in the event of the suit, except in the cases directly mentioned in section 858, Revised Statutes of the United States, i. e., where an executor, administrator, or guardian is a party such as that judgment may be rendered for or against him.
2. PARTNERSHIP.—Under the circumstances of this case, held that no partnership existed between the plaintiff and B. B. Norton.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

THE facts appear in the opinions.

Lewis & Deal, for plaintiff.

C. H. Bellnap, for defendants.

Charles S. Varian, for intervenors.

HILLYER, J. The plaintiff claims to have been a partner of B. B. Norton, in his lifetime, in a band of cattle known as the figure 2 cattle, and in a ranch known as the Duck Flat ranch. The main question is whether he was so or not.

Incidental to this is a question of statutory construction, involving the law of Nevada, and section 858 of the revised statutes of the United States.

The question is, whether Rice is a competent witness as to transactions between himself and Norton—Norton being dead. Section 377 of the practice act of Nevada abolishes all disqualifications of a witness "by reason of his interest in the event of the action or proceeding as a party thereto or otherwise" (Comp. Laws, sec. 1438); and section 379 as amended, provides, that "no person shall be allowed to testify *under the provisions of section 377* when the other party to the transaction is dead." (Statutes 1879, p. 49.)

Section 858 of the revised statutes of the United States enacts that "in the courts of the United States no witness shall be excluded * * * in any civil action because he is a party to, or interested in, the issue tried. * * * In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States." These are the provisions of law in force, and the defendants object to the testimony of Rice on the ground that Norton, the other party to the transaction, is dead. At common law a witness was disqualified who was either a party to the action or interested in the event of the suit. Section 377 removed that disqualification. Under that section every person directly interested in the suit as a party or otherwise is competent. The object of the section was to enlarge the competency of witnesses—to increase the number of cases in which a witness could testify, and it had that effect. Then follows the limitation in section 379,

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“No person shall be allowed to testify *under the provisions of section 377.*” * * *

The only persons rendered competent by section 377 were, for our purposes, persons who before had been disqualified by reason of interest in the event of the action or proceeding. It must be some person rendered competent by section 377, not so before, upon whom the restriction in section 379 must be placed. In other words, the witness disqualified by section 379 must be some person who had an interest in the event of the action.

It could not have been the intention of the legislature to narrow the competency of witnesses where, before the adoption of section 377, they had been competent—the reference to that section in section 379 forbids that idea. “Party to the transaction” must, therefore, be referred to a person who has some interest in the event of the action as a party thereto or otherwise. And section 379 must be read as if the language were “when the other party [being a person who has an interest in the event of the action or proceeding as a party thereto or otherwise] to the transaction is dead.” But by section 858 of the revised statutes of the United States no person is to be excluded because he is a party to or interested in the issue tried, with but one proviso, viz.: “That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court.”

This proviso does not embrace this case. The state statutes are to be rules of decision only in cases where the constitution, treaties, and statutes of the United States do not otherwise provide. When they do otherwise provide, the state laws cease to be of force. To illustrate by so much as fits this case: No witness is to be excluded because he is a party to the issue. This is broad enough to cover every case in which a party is offered as a witness, and the objection is on the ground of interest, as I have endeavored to

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show it must be in this case. When we look for any exception, we find that there is none except in cases in which the suit is brought by an administrator, executor, or guardian, which is not this case—there being no administrator, executor, or guardian as a party in the case. It seems to me that in reading section 858, counsel for the defendants has taken the exception in the proviso for the rule. "In the courts of the United States no witness shall be excluded because he is a party." This is the rule with this proviso, Provided, That in actions by or against executors, administrators, or guardians, neither party shall be allowed to testify against the other, and so the court held in *Potter v. Bank*, 26 Int. Rev. Rec. 403. "We have seen," says the court in *Potter v. Bank*, "that the existing statutes of the United States do otherwise provide in that they forbid the exclusion of a witness upon the ground that he is a party to, or interested in, the issue in any civil action whatever pending in a federal court, except in a certain class of actions which do not embrace the one now before us."

In *Lucas v. Brooks*, 18 Wall. 436-453, the court says: "Undoubtedly the act of congress has cut up by the roots all objections to the competency of a witness on account of interest. But the objection to a wife's testifying on behalf of her husband is not and never has been that she has any interest in the issue to which he is a party. It rests solely on public policy. To that the statute has no application."

In this latter case the deposition of the wife was refused, and in *Packet Company v. Clough*, 20 Wall. 528, 537, it was received because the statute of Wisconsin made the wife a competent witness.

Thus showing that the supreme court do not regard the law of congress as in any way affecting the competency of married women, but leaves that to rest where it did before.

Both matters rest alike on public policy—neither on interest. When the laws of the United States speak, they are controlling. Says the court in the latter case: "Now, the competency of parties as witnesses in the federal courts depends on the act of congress in that behalf passed in 1864, amended in 1865, and codified in the revised stat-

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utes, section 858. It is not derived from the statute of Ohio, and is not subject to the conditions and qualifications imposed thereby. The only qualifications which congress deemed necessary, are expressed in the act of congress; and the admission in evidence of previous communications to counsel, is not one of them." This is very strong, and fully warrants us in admitting the testimony of the plaintiff, Rice, in this case.

Coming now to the facts, there is nothing in the testimony of any of the plaintiff's witnesses, or in Norton's letter, inconsistent with the theory of the defendants, that the purchase of the cattle and ranch was, in fact, negotiated by and through Rice on joint account, but was given up for lack of funds to carry out the bargain. All agree that the final delivery did not take place until June 5, 1875.

At that date, Rice says he was half satisfied that Norton denied his interest; yet he never, according to his own story, had any distinct understanding with Norton in his lifetime. After his death, he comes forward to claim a half interest in the ranch, cattle, and increase.

In legal contemplation, to be *half* satisfied is to be put on inquiry, and to know, definitely, one way or the other. Rice, therefore, knew that Norton denied his interest in June, 1875. Rice says, at page 52 of his testimony, "From the summer of 1875, until Norton's death, Norton and I transacted the business of partnership as follows, we consulted," etc.; which means, if anything, that Norton recognized him as having an interest; yet farther on, at page 82 *et seq.*, he confesses that he was completely shut out from any management of the alleged partnership property, and half believed that Norton denied his rights, as early as June, 1875. When the defendants assert that Rice gave up the contract because he had not enough money to perform it, he has no trouble in showing, by himself and other witnesses, that he had a large amount (between twenty and thirty thousand dollars' worth) of property; when, on the other hand, he is asked to explain why he did not move in this matter during Norton's lifetime, and, at least, have a perfect understanding with him, he says he was too poor to

bring a suit and do justice to his creditors; that being half satisfied Norton denied, or would deny his interest, if he approached him on the subject, he never said anything to him.

For a third reason or excuse for his laches he says, at page 56, "Mr. Norton always held out to me that he would soon be able to settle accounts," i. e., partnership accounts. If he believed that Norton denied his partnership interest, as he must, he could not have had any genuine belief that he would settle.

One Albert Shuler testifies that at the time Rice bought into the Tommy Smith place and cattle, he made arrangements with him to furnish unbroken cows to run a dairy, on the strength of which he rented a dairy-house and fenced a calf-pen; and his failure to furnish the cows as agreed, was a great disappointment and loss.

When this is compared with those portions of the testimony of Rice, in which he seeks to convey the idea that he did not know positively that Norton denied his interest in the cattle, it will appear very strange that he should have subjected himself to such loss, and disappointment to his friend, without so much as asking Norton for cows enough to start Shuler's dairy. But it is plain from all the testimony of Rice that he was well enough satisfied that Norton did not regard him as his partner, at least after June 5, 1875.

If at that date the plaintiff had been ready to comply with his part of the partnership agreement, and Norton refused, plaintiff would have had his action then for a breach of that agreement. Instead of suing, then, he waits four years and sees Martin and Clark, taking an interest with Norton, during all that time. In addition, Dwelly takes an interest, and after the intervenors have loaned Norton seven thousand dollars, and taken these figure 2 cattle as security, and after Norton is dead, he sues for his half interest in the ranch, cattle, and increase.

No sufficient reason is given for this delay, and for all these unnecessary complications of interests. The duty of the plaintiff on the fifth day of June, 1875, was plain. When he mistrusted that Norton was denying his interest in the

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partnership, he should have had an understanding with him at once. Had he broached the subject to Norton at that time, he would have learned that Norton did deny his interest, and that he had a right of action against him for a breach of his partnership agreement, in which, if he proved the breach, he could have recovered such damages as could have been proved at that time. But it seems inequitable to permit him to lie by for four years, all the time under a belief that he was not recognized as a partner by Norton, until time has obscured every fact with doubt and Norton is dead. (*Elmendorf v. Taylor*, 10 Wheat. 168; 6 Pet. 66.)

To the case as made by Rice a full defence has been proved. It is not denied that Rice, the plaintiff, negotiated the trade as related by Smith in his deposition. But the claim is that in January, 1875, he withdrew from the arrangement and gave up the cattle to Norton, with the understanding that if he could arrange his money matters so as to be able to bear his share of the cost, he should be taken back; but that he never was able to do so. In support of this they show by Smith, the owner of the cattle, that after Rice had negotiated for the cattle, in the fall of 1874, he came to his place with Norton and Martin in January, 1875, and that Norton took him aside and told him that Rice was in trouble about some sheep, and that he (Norton) would take the cattle in his own name with the consent of Rice; and that after this he considered Rice was not in the trade. Nor, except as to some cattle paid for in 1874, does it appear that Rice ever had anything to do with the cattle or ranch after January, 1875. His conduct, at this time, is all in corroboration of the truth of Smith's statement. And thence on until June 2, 1879, when he serves his notice on defendants, claiming a half interest, he does nothing which indicates that he is a joint owner, or believed he was. He does not act like an owner. It is not probable that Norton would take the occasion when Rice was there to tell Smith what he did unless Rice had in fact given his consent. It may be readily inferred from the deposition of Smith that Norton, Rice, and Martin came to Smith's ranch for the purpose of getting the consent of Smith to the withdrawal

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of Rice, and that what was said by Norton to Smith was but a continuance of some former conversation. This testimony of Smith's touching any conversation with Norton out of the hearing of Rice is objected to, but it would be admissible upon the point, whether Rice did or did not assent to Norton's taking the cattle, as a circumstance tending to show that he did assent. But be this as it may, Rice's conduct at the time of the final delivery is a confirmation of the truth of the testimony that he had given up his interest in the property. His inquiry of Smith whether Norton had said anything to him about taking him back, and his yielding possession and control of everything to Norton and Martin & Clark, and asserting no claim, are all circumstances hard to explain on any theory of ownership in Rice.

Mr. Dwelly may be interested in this suit, but it is not easy to see how. Rice, as a partner of Norton, it would seem, can have no remedy for Norton's dealings with the partnership property, except against him in the absence of fraud or collusion. Dwelly's testimony, corroborated by the other circumstances, and by the testimony of Welsh, ought to outweigh that of Rice. Dwelly testifies that Rice did tell him, in his butcher-shop at Reno, that he had been obliged to give up the Tom Smith trade. Welsh testifies that he told him the same thing, but could get the cattle back if he could get money to work with. The defendants have answered the criticisms of plaintiff on the testimony of Dwelly, and have explained perfectly why he testified more fully when he testified for the defendants than when he testified for the intervenors. The testimony was taken for the intervenors September 8, 1880; for the plaintiff from January 5 to 8, 1881; and for the defendants, from January 21 to 26, 1881.

The bill must be dismissed, with costs to defendants; the intervenors to have the relief prayed.

SAWYER, Circuit Judge. The question as to the competency of Rice's testimony being an important one, I desire to add some observations to those made by my associate.

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Rice is a party to the suit; and, also, to the transaction in issue alleged to have been had between him and Norton in the lifetime of the latter, under whom the opposite parties claim title. For the purposes of the decision, I shall assume, without deciding the point, that the opposite parties to Rice, being successors in interest to Norton, who is deceased, are "representatives of a deceased person," within the meaning of the statute of Nevada, as amended in 1879. (Stat. Nev. 1879, 49.) The question, then, is, whether the statutes of the United States have an express direct provision upon which the competency of Rice depends, or whether the case falls within those provisions of the United States statutes which make the competency depend upon the statute of Nevada upon the subject. The testimony was incompetent at common law, because Rice is a party to the suit, and interested in the controversy.

If his testimony is competent, then, it is because some statute of the United States makes it so directly by some express provision applicable to the case, or, indirectly, by making the competency depend upon some statute of Nevada rendering it competent. If the competency is referred to the statute of Nevada, and governed by that, then, upon the assumption stated, the testimony is inadmissible, under the section referred to—the opposite party being the "representative of a deceased person." Section 858 of the revised statutes of the United States applicable to the case, reads as follows: "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided*, That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses

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in the courts of the United States in trials at common law, and in equity and admiralty.”

The competency of Rice's testimony depends upon the construction of the words “in all other respects,” etc., of the last clause in its relation to the rest of the section. Do they refer to the proviso immediately preceding, or to the main provision of the section, as limited by the proviso? Although the statute has been in some instances unconsciously changed in the revision, this was unintentional, as the revisers were required to express in the revision in a concise form the statutes as they before stood; and they, doubtless, in all cases contemplated carrying out the intention as expressed in the statute authorizing the revision.

Where there is any ground for doubt as to the meaning of a provision of the revised statutes, an examination of the statutes as they stood before the revision will often render the meaning clear. In all cases where the revision will bear a construction in harmony with the statutes as they before stood, that construction should be adopted. The first act passed by Congress touching this question was that of 1862, which is as follows: “The laws of the State in which the court shall be held, shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, in equity and admiralty.” (12 Stat. 588, 589.)

This left the whole question to be determined by the State statute, and under this statute, on the assumption stated, Rice's testimony would be clearly inadmissible under the amended statute of Nevada before cited, Rice being a party, and “the opposite party” being the “representative of a deceased person,” etc. The next statute of the United States touching the question is found as an incongruous appendage to section 3 of an appropriation act of 1864, and reads as follows: “Provided that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to or interested in the issue tried.” (13 Stat. 351.)

This is broad in its terms, and without exception in the case of any party in interest. Clearly, under this provision, Rice

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could not be excluded. This provision limits the operation of the provisions of the act of 1862. So that the two sections taken together would read as follows: "The laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law, in equity, and admiralty," "provided, that in the courts of the United States there *shall be no exclusion* of any witness * * * in civil actions because he is a party to or interested in the issue tried." Under the statute as it thus stood, the laws of Nevada excluding a party where the opposite party is the representative of a deceased person, is not adopted, and such party is a competent witness under the direct provision of the act of congress. The next act of congress was that of 1865, which provides, "that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."

This was but a limitation put upon the sweeping provision of the act of 1864, last cited, which admitted parties under all circumstances to testify, and the limitation only embraces the case of "executors, administrators, or guardians." It does not reach "the representatives of a deceased person." Hence as to such party the statute as it before stood remains unchanged, so that on adding this further proviso to the statute as it before stood, Rice is still a competent witness. Thus the statute stood at the date of the revision when all these three statutes were carried into section 858 of the revised statutes. Instead of placing the first act adopting the state law first in the section, it was placed last, next following the proviso, but without any intention of changing the meaning, so that the principal clause in section 858 of the revised statutes and its proviso is merely a limitation upon the act of congress first passed, as stated, adopting the laws as to competency

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of witnesses expressed in a little different form in the last clause of said section.

Under this direct provision of the United States statute, therefore, the testimony of Rice is admissible. From the foregoing it will be seen that the general rule in civil actions now, as before the revision, is that the laws of the state as to the competency of witnesses, govern, except that the state laws excluding witnesses on account of color, and laws affecting the competency of parties in interest to the issue to be tried, are inapplicable. The competency of such witnesses depends wholly upon the direct provisions of the United States statutes.

Upon the facts and other points discussed, and as to the decree ordered, I, also, concur with the district judge.

E. DETRICK ET AL. v. R. BALFOUR ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

AUGUST 22, 1881.

1. CHANGE IN DUTIES.—In a contract for the purchase of goods to arrive from Calcutta, it was provided: "Any change in duties to be for or against purchasers." After the making of the contract, and before the payment of the duties, the Secretary of the Treasury, in pursuance of section 3564 of the revised statutes, proclaimed a reduction in the value of the rupee, being the currency in which the invoices were made out (R. S. 2828), in consequence of which change in the value of the rupee, the amount of the duties required to be paid was diminished: *Held*, that the "change in duties" provided for in the contract, is a change in the rate of duties prescribed by law, and not a change in the aggregate amount of duties incidentally resulting from a change in the value of the rupee.
2. STATUTES CONSTRUED.—Sections 2838, 2906, 3473, and 3564 of the revised statutes of the United States construed.

Before SAWYER, Circuit Judge.

ON November 14, 1879, the plaintiffs and the defendants interchangeably entered into the following contract:

"SAN FRANCISCO,
204 California Street, November 14, 1879. }
"I have this day sold to Messrs. E. Detrick & Co., on

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account of Messrs. Balfour, Guthrie & Co., five hundred thousand (500,000) standard twenty-two by thirty-six grain sacks, *ex Evelyn*, from Calcutta, at the duty-paid price of nine and five eighths cents ($9\frac{5}{8}$ cents) each, United States gold coin, on delivery in good order and condition on the fifteenth day of May next. Marks and numbers to be declared on receipt of invoice, and allowance on damaged bales (if any), failing a satisfactory adjustment, to be submitted to arbitration. Contract void, should vessel not arrive by or on the 15th of May, 1880. It is at sellers' option on or before 1st prox. to change the character of this contract to positive delivery at nine and three quarters cents ($9\frac{3}{4}$ cents) each, for the first day of June.

"Approved: Balfour, Guthrie & Co.

"WILSON WHITE, Broker.

"Any change in duties to be for or against purchasers. B., G. & Co., by R. B."

All the material facts of the case, except the testimony as to the meaning attributed by the merchants of San Francisco to the memorandum at the foot of the contract, "any change in duties to be for or against purchasers," are contained in a stipulation filed in the cause.

The duty on the bags mentioned in the contract was, at the time when it was entered into by the respective parties, 40 per cent. *ad valorem*. This rate of duty has never been changed.

Sections 2838 and 3564 of the revised statutes of the United States provide as follows:

"Section 2838. All invoices of merchandise subject to a duty *ad valorem* shall be made out in the currency of the place or the country from whence the importation shall be made, and shall contain a true statement of the actual cost of such merchandise in such foreign currency or currencies, without any respect to the value of the coins of the United States, or of foreign coins by law made current within the United States, in such foreign place or country."

"Section 3564. The value of foreign coin as expressed in the money account of the United States shall be that of the

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pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the director of the mint, and be proclaimed on the first day of January by the secretary of the treasury."

The merchandise, which was the subject of the foregoing contract, was purchased in Calcutta, and the invoice value thereof was made out in rupees, the currency of that place.

The value of the rupee in the currency of the United States, on the fourteenth day of November, 1879, the time of making the contract, was, as proclaimed by the secretary of the treasury on the first day of January, 1879, forty-four and four tenths cents.

The value of the rupee in the currency of the United States, at the time when said merchandise was imported into the United States, and entry thereof made at the office of the collector of customs for the port of San Francisco, which was after the first day of January, 1880, was, as proclaimed by the secretary of the treasury on the first day of January, 1880, thirty-nine and seven tenths cents.

The dutiable value of the merchandise was, therefore, ascertained by reducing the invoice valuation in rupees to the currency of the United States at the rate of thirty-nine and seven tenths cents per rupee. The full amount of duties on the merchandise, estimated on the value of the rupee at thirty-nine and four tenths cents, was nine thousand four hundred and sixty-six dollars, which was the amount actually paid. If the duties had been estimated on the value of the rupee at forty-four and four tenths cents, as proclaimed by the secretary of the treasury, January 1, 1879, they would have amounted to ten thousand five hundred and eighty-seven dollars and twenty cents.

The difference in the amount of duties, arising from the above-mentioned difference in the value of the rupee in the currency of the United States, was, therefore, one thousand one hundred and twenty-one dollars and twenty cents. It is to recover this amount that the present action is brought by E. Detrick & Co., the purchasers of the goods.

Rhodes & Barstow, for plaintiffs.

William Barber and Andros & Page, for defendants.

SAWYER, Circuit Judge. The plaintiffs' counsel make a very ingenious and plausible argument, to show that the words "change in duties," in the clause in question, mean not a change in the *rate* of duties made by law, but a change in the *amount* of duties from whatever cause the amount of duties to be paid may be affected. But after a careful consideration of the subject, I find myself unable to adopt that view. The word "duties," as used in this clause, doubtless, means the tax, charge, custom, toll, or tariff, levied by act of congress upon the goods—in this case bags—imported.

Congress, in its action upon the subject, regulates the *duties* properly so called, generally, if not always, expressly and directly by prescribing some uniform rate of duties either specific or *ad valorem*. And, generally, doubtless, unless there is something in the surrounding circumstances to indicate a different sense, men, also, in their business transactions, and in ordinary conversation in speaking of the duties on imports, use the term with reference to the charge so directly and expressly imposed according to the rate and rule prescribed. They are spoken of and considered in their immediate, direct, and not in their remote or incidental relations.

We all know as a matter of general, national, political, as well as legislative and statutory history of the country, that during our late civil war the demands for large revenues induced frequent and continual changes in our revenue laws. The rates of duties, as well as the subjects upon which they were imposed, were constantly changed, as necessity and experience suggested modifications, and these changes continued after the close of the civil war, as the demands for large revenues diminished while we were getting back to a peace basis again. These frequent changes in the laws imposing duties presented a new element of uncertainty for the merchant to take into consideration in making contracts to be fulfilled in the future, and, doubtless, the introduction of the clause in question had its origin in such a condition

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of things. The direct and usual, if not the only mode of changing duties, when that is the purpose to be accomplished, is to change the rate, whether the duties are specific or *ad valorem*, and the language adopted in the contracts, "change of duties," to provide against these contingencies, is well adapted to the purpose, and was, doubtless, adopted with reference to such intentional, direct, and express changes of duties. When the purpose of congress is to change the duties, it manifests that purpose by legislating directly upon the subject. If, in other legislation, it in some instances affects the amounts of duties required to be paid, that effect is incidental and purely accidental. And when parties contract with reference to changes of duties, in all probability they would only contemplate the intentional changes in the duties usually depending on changes of rate, and not those rare, unlooked-for instances, where the amount of the duties is accidentally affected as incidental to legislation or official action designed to effect other objects. If parties contemplated protecting themselves against remote, accidental effects, they would be very apt to use language to clearly manifest such a purpose. The plaintiffs' counsel insist that the parties could not have contemplated a change in the "rate" of duties; that if they had, they would have inserted the word "rate" in their contract, and as they have not used the word it cannot be interpolated. It may just as well be argued that they did not mean the "amount" of duties; if they had, the word "amount" would have been used, and we are no more authorized to interpolate the word "amount" than "rate."

A plain common-sense view of the question must be taken. The change in the amount of the duties in this instance resulted from a change in the value of the rupee, or the money of the country whence the goods were imported. Section 2838 of the revised statutes requires the invoice to be made "in the currency of the place or country from whence the importation shall be made, and shall contain a true statement of the actual cost of such merchandise in such foreign currency," etc. And section 2906 of the revised statutes requires the collector to adopt the actual market value *at the*

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period of exportation to the United States in the principal markets of the country whence the goods are imported; and the period of exportation is, the day of sailing from the foreign port. (*Scmpson v. Peaselee*, 20 How. 571.) And duties must be paid in money of the United States. (R. S., sec. 3473.) The value of all foreign coins must be estimated in money of the United States by the director of the mint, and proclaimed by the secretary of the treasury on the first of January of each year. (R. S., 3564.) The object seems to be to get at the actual value of the foreign coin in the money of the United States. (*Collector v. Richards*, 23 Wall. 246.) By obtaining the actual value of the foreign coin in our own money, we obtain the actual value of the goods estimated in foreign coins in the money of the United States. In this case there was a change in the value of the rupee between the time of the contract and the time of the importation, by which the value of the rupee was lessened, consequently the value of the goods was diminished. There was a diminution of the dutiable value of the goods—a change, a diminution in the value upon which duties were to be paid, and not a change in the duties to be paid upon that value. The result was the payment of a smaller *amount* of duties, not because of a “change of duties,” but because the value of the goods upon which the duties were paid was smaller. This resulted from no action of congress, or of anybody else acting under the authority of congress intended to affect either the amount or rate of duties, but was incidental to the exercise of other powers to regulate the money of the country, and purely accidental. It might as well be claimed that a diminished or increased amount of duties resulting from a diminution, or appreciation of the dutiable value of the goods after the contract, and before importation, resulting from any other cause, is within the terms of the clause of the contract in question. Had the parties contemplated a change in the amount to be paid resulting from a change in the value of the rupee it is more reasonable to suppose that they would have made the clause read something like this: “Any change in duties, or in the value of the currency of India (or the rupee), to be for or against the purchaser.”

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than to suppose the construction claimed for the clause in question had been contemplated. The change in value of the rupee is quite as distinct and independent a contingency to be considered and provided for as the "change in duties," and the language suggested would be far more apt and appropriate to express the additional idea. The more natural construction of the language used, is, to limit it to a direct change in the rate of duties by congressional legislation, or by authority of congressional legislation, and not to extend it to changes in amount of duties rarely effected, and incidentally and accidentally resulting from legislation and official action intended to effect other objects having no reference to duties or revenues.

This is the conclusion to which my mind has come from a consideration of the language itself, viewed in the light of the general and legislative history of the country, without considering the testimony of witnesses relating to the general understanding of merchants as to the purpose and signification of the clause in question.

If, however, testimony is competent to show what the purpose and signification of the clause is as generally understood in the mercantile community, where the contract is made, then the testimony clearly shows, that it is understood to be limited to changes in the rate of duty by authority of congressional legislation, as I have already held. The plaintiffs' counsel insist that if this testimony is admissible, it can have no significance, for the reason that the provision now found in section 3564 of the revised statutes, was not adopted till long after the war, and long after the custom having its origin in the war and its attendant legislation of introducing the clause in question had been established; and at that time the question whether a change in foreign coin would work a change in the duty could not have arisen. Concede this to be so, then, if such a question could not have arisen, for that reason, it follows that the parties making those contracts at that time could not specifically have contemplated embracing such a change in the amount of duties in the term "change of duties," as used in these contracts, and it is not probable that the sense has since been

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extended. In my judgment, in any view I can take of the matter, such a change in the amount of duties to be paid was not contemplated by the parties when the contract was made, and is not embraced in the words, "change in duties."

There must be a finding and judgment for defendants, and it is so ordered.

COLLIS P. HUNTINGTON v. CHARLES E. PALMER,
TAX COLLECTOR, ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

AUGUST 16, 1881.

1. **TAXES—INJUNCTION.**—No injunction will be granted to stay the collection of taxes upon a bill which does not affirmatively show that so much of the tax has been paid or tendered without demanding a receipt in full, as is conceded ought to be paid, or so much as the court can see, or as can be shown by affidavits should be paid.
2. **SAME.**—A bill to restrain the collection of taxes which does not show a payment or unconditional tender of so much of the tax as is conceded, or can be shown to be properly due, does not present any equity sufficient to justify either preliminary or final relief.

Before SAWYER, Circuit Judge, and HOFFMAN, District Judge.

THE opinion of the court sufficiently presents the facts.

McAllister & Bergin, for complainant.

A. L. Hart, attorney-general, *Rhodes & Barstow*, *J. P. Hoge*, *D. M. Delmas*, *George W. Towle, Jr.*, *J. L. Murphy*, and *E. S. Pillsbury*, for Tax Collectors.

By the Court, SAWYER, Circuit Judge. This is a bill in equity, brought by a stockholder of the Central Pacific Railroad Company on behalf of himself, and all other stockholders who shall come in and contribute to the expense of the suit against the corporation, and the tax collector of Alameda county, to enjoin the collection of a state and county tax, as being illegal and unconstitutional on various grounds; and as such utterly and *in toto* void. The defend-

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ant, Palmer, demurs to the bill for want of equity. The bill contains the usual allegations of such bills brought by stockholders, but it fails to allege the payment, or even the tender of any part of the tax, and for the want of this allegation, alone, without reference to any other point involved, the said defendant insists that the bill is without equity, and must be dismissed. He relies upon the *State Railroad Tax Cases*, 92 U. S. 575, and subsequent decisions, to sustain the position. There were three of the *State Railroad Tax Cases*, neither of them brought by the corporation itself. In the first, the trustees and mortgagees holding the road for the security of the bondholders were complainants; in the last two, the complainants were stockholders, precisely as in this case. So far, then, as the parties are concerned, the last two cases, at least, were like this, and governed by the same principles. There was a willingness to pay so much of the taxes as might have been legally assessed alleged in the bill. It was also alleged that the assessment was wholly void (p. 589). It is true, the court in those cases held that the objections made to the tax were not well founded; but another point, as to want of an allegation of payment, was fairly presented by the bill, and as distinctly decided. It having been fairly presented by the record, argued, considered, and decided, it cannot, as is claimed by complainant, be considered a mere *dictum*, because another point was, also, presented and decided, requiring the same decree. (*Starr v. Stark*, 2 Saw. 639, affirmed 94 U. S. 488.) The latter might as well be called a *dictum* as the former. Indeed, since it was necessary to dismiss the bill on the point of equity jurisdiction alone, without regard to the other points presented, the opinions on the other points, if any, were *dicta*.

The court says: "But there is another principle of equitable jurisprudence which forbids in these cases the interference of a court of chancery in favor of complainants. It is that universal rule which requires that he who seeks equity at the hands of the court must first do equity.

"The defendants in all these cases are the clerks and treasurers of the counties—the clerk, who makes out the tax list, and the treasurer, who collects the taxes. These taxes are both

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the state and county taxes. It is clear, from the statements of the bills and from what we have already said, that there must be in every county mentioned a considerable amount of real estate and personal property coming within the character of local tangible property, and subjected to taxation on precisely the same principles, and no other, that all other personal and real estate within the county is taxed. It is equally clear, that the road-bed within each county is liable to be taxed at the same rate that other property is taxed. Why have not complainants paid this tax? In reference to the latter, it is said that they resist the rule by which the value of their road-bed in each county is ascertained, and therefore resist the tax. But surely *it should pay tax by some rule*. If the rule adopted gives too large a valuation in some counties, it must be too small in others. What right have they to resist the tax in the latter case? And in the former, is the whole tax void because the assessment is too large? Should they pay nothing, and escape wholly, because they have been assessed too high? These questions answer themselves. Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them.

“It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years’ litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is no equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without

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the condition annexed of a receipt in full for all the taxes assessed.

“We are satisfied that an observance of this principle would prevent the larger part of the suits for restraining collection of taxes which now come into the courts. We lay it down with unanimity as a rule to govern the courts of the United States in their action in such cases.”

Thus, as we understand it, the court distinctly holds that some tax, according to some rule of taxation, ought to be paid on all taxable property, and that a bill which does not allege a payment of so much of the tax, as the party concedes, or, if not conceded, may be seen from the bill, or shown by affidavit, ought to be assessed and paid, does not present any equity to justify an injunction. And the court takes particular pains to say to the circuit courts that they are expected to conform to this view. Its language is: “We lay it down with unanimity, as a rule to govern the courts of the United States in their action in such cases.” (Id. 617.) The defendant endeavors to distinguish the present case from those cited, on the ground that in the latter the assessments were merely unequal, and, therefore, only void as to the excess; while in this case the tax is unconstitutional and void in its entirety. We have always supposed that the assessment of a tax *in solido*, which is void as to part, is wholly void. And the bill in the cases cited alleged the tax to be wholly void. (Id. 589.) But however this may be, the supreme court at the last term determined this precise point, also, adversely to defendant, in *National Bank v. Kimball, Collector, etc.* The bill was dismissed by the circuit court on demurrer. It alleged the tax to be in violation of both the acts of congress and the constitution of the state of Illinois, and wholly void, as in this case. The decree dismissing the bill was affirmed by the supreme court. The supreme court, in affirming the decree, says:

“We think there are two fatal objections to the bill. The first of these is, that *there is no offer to pay any sum as a tax which the shares of the bank ought to pay.* We have announced more than once, that it is the established rule of this court that no one can be permitted to go into a court of equity to

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enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay." The court further says: "The bill attempts to evade this rule *by alleging that the tax is wholly void*, and therefore none of it ought to be paid, and that by reason of the absence of all uniformity of values, it is impossible for any person to compute or ascertain what the stockholders of the complainant bank ought to pay on the shares of the bank." (102 U. S. 733.) This is precisely the distinction sought to be drawn here between this case and the *State Railroad Tax Cases*. But the supreme court in considering this distinction, when sought to be set up in the *National Bank Case*, quoted several passages from its decision in the *Railroad Tax Cases*, which need not be repeated here, and then said: "These principles are *sufficient to decide the case*, and were declared by this court in a case arising in the same state and under the same constitution and revenue laws with the one now before us." The decree dismissing the bill was affirmed on the ground that there was no allegation of payment of a part of the tax. Thus the supreme court has itself denied the distinction sought to be established in this case; and its decisions are controlling in this court. The able decisions of the supreme court of Wisconsin, relied on by defendant, conceding them to adopt a different view, must yield in the national courts to the superior authority of the supreme court of the United States.

We are unable to distinguish the present case from those already cited from the supreme court. Under the decisions in those cases, the bill presents no sufficient equity to justify an injunction, because there is no allegation of payment of so much of the tax as must be conceded ought to have been assessed and paid.

On the authority of the cases cited, the demurrer must be sustained on the grounds indicated, and the ground being jurisdictional, it becomes unnecessary, if not improper, to consider any of the other points raised by the bill and demurrer. As it is understood that the bill cannot be truthfully amended, so as to avoid the objection considered, it must be dismissed; and it is so ordered.

J. F. COYNE, FOR SELF, AND AS GUARDIAN OF
GEORGE T. COYNE, v. HEZEKIAH CAPLES.

DISTRICT COURT, DISTRICT OF OREGON.

AUGUST 25, 1881.

1. **EXCLUSIVE USE OF VESSEL BY A PART OWNER.**—A part owner of a vessel is not entitled to her exclusive use without giving security to his co-owner.
2. **PROFITS FROM USE OF VESSEL.**—Where a part owner of a vessel employs her on his own account and risk, the other part owners are not entitled to a share of the profits arising from such employment.
3. **COMPULSORY SALE OF VESSEL.**—Where the equal part owners of a vessel cannot agree concerning her use and employment, a court of admiralty has jurisdiction, upon the application of either party, to compel a sale of the same and divide the proceeds between the owners; but where the disagreement arises between unequal owners the jurisdiction is, though without good reason, doubted and denied.
4. **THE CASE DECIDED.**—An equal part owner of a vessel in the exclusive possession thereof required to give security for the return of his co-owner's interest, at the close of the business in which she was engaged, and in default thereof ordered that the vessel be sold; and that either party may apply for an order of sale upon the expiration of the stipulation for return.

Before DEADY, District Judge.

C. J. Macdougall, for libellant.

Addison C. Gibbs, for defendant.

DEADY, J. The libellant, J. F. Coyne, brings this suit for himself and his ward, George T. Coyne, to procure a sale of the steamboat *Gazelle*, and a division of the proceeds between himself and his equal part owner, Hezekiah Caples.

The testimony concerning the circumstances or agreement under which Caples came into possession of the vessel is conflicting, but the facts appear to be as follows:

In December, 1880, and for some time previous, the stern-wheel steamboat, of one hundred and fifty tons burden, called the *Gazelle*, was licensed and enrolled at this port and owned by J. F. Coyne, George T. Coyne, and Omer J. Bryant—the latter having one half, J. F. Coyne one sixth, and George T. Coyne on third, when Bryant sold his interest to Caples for one thousand five hundred dollars.

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The employment of the vessel had not been profitable, and the boat then owed J. F. Coyne five hundred and nine dollars and sixty cents on account of money expended by him in payment of her expenses beyond his share, and was in debt to Harvey Higley, the engineer, the sum of two hundred and fifty dollars for wages.

On December 23d, Caples paid Coyne for said Bryant said sum of five hundred and nine dollars and sixty cents, and agreed to pay Higley said two hundred and fifty dollars within a year—the latter agreeing to release his claim against Coyne or his interest in the boat therefor—and said Caples and Coyne, in consideration of the premises, and that the former would give security to pay said Higley's demand and keep the boat in good order and free from debt, agreed that said Caples might take said boat into his possession, and manage and employ her where and as he pleased. In pursuance of this agreement, and with the consent of Coyne, Caples had the machinery of the vessel repaired at a cost of not exceeding five hundred dollars, and then, without giving any bond to the former, took her down the Columbia river, and had her enrolled at the port of Astoria, with himself as managing owner, where she has since been employed principally in carrying lumber and railway ties.

The employment of the vessel by Caples appears to have been profitable, and she has been kept in good condition, but not free from debt. The claims now existing against her and incurred since she came into his possession and control, amount to not less than five hundred dollars, and probably more.

In his libel Coyne alleges that Caples was not only to give security as aforesaid, but also to account to him for half the profits, if any; while in his answer, Caples claims that he was not bound to account for the profits or even give security for any purpose, but that he obtained and was entitled indefinitely, to the exclusive possession and use of the vessel, in consideration of the five hundred and nine dollars and sixty cents paid by him to Coyne. But the evidence, in my judgment, does not support either of these allega-

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tions. And in coming to this conclusion, the conflicting evidence of the parties and their friends is controlled by the consideration that it is absurd to suppose that an equal part owner of a vessel would consent, without any corresponding consideration, that another equal owner might take her and employ her when and where and as long as he pleased, without giving security to safely return or account for the interest intrusted to his use and care.

The payment of the five hundred and nine dollars and sixty cents by Caples was no consideration for such use and possession, because in making the same, he was only discharging his own debt to Bryant, and Coyne was not materially benefited thereby, as Bryant's interest was good security to him therefor. Indeed, if there had ever been such an understanding between the parties, under the circumstances, Coyne might nevertheless assert his right to security, and compel Caples to comply or give up the use of the vessel. Nor is it reasonable to suppose, that such part owner in a vessel would agree to take her upon security to the other part owner and employ her at his own risk and expense, and share the profits, if any, with the latter. Such an arrangement is regarded as unjust, and therefore a part owner who refuses to join in or contribute to the employment of the vessel is not entitled to a share of the profits. (*Willings v. Blight*, Pet. Ad. Dec. 288; *The Marengo*, Low, Dec. 52; Story Part., secs. 428, 431.)

Besides, it does not appear that Coyne ever demanded or sought to have an account from Caples, and in his letter to the latter of May 11th, asking him in effect to purchase his interest in the vessel, or return her to this port, because he had determined to sell, and wanted "to avoid any further risk," nothing is said or suggested on the subject.

There seems to be some doubt in the books as to the jurisdiction of a court of admiralty to compel a sale of a vessel on account of a disagreement between her owners as to her employment at the instance of a minority in value. No substantial reason is given for declining the jurisdiction, while every argument suggested by analogy and convenience

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is in favor of it. (Story Part., secs. 437-439; 2 Par. S. & A. 342; Ben. Ad., sec. 274.)

But in the case of an equal division of interests the jurisdiction is generally admitted. (*The Hope*, Bee. 2; *Orleans v. Phœbus*, 11 Pet. 183; Story Part., sec. 439; 3 Kent, 153, 154 n. a; *The Ocean Belle*, 6 Ben. 253; *Davis v. Brig Seneca*, 18 Am. Jurist, 486; *The Marengo*, Sprague's Dec. 506; *Fox v. The Lodemed*, Crabbe, 271; Ben. Ad., sec. 274.)

Yet, under the circumstances of this case it does not seem equitable to order a sale at once, and thereby possibly prevent Caples from completing or having the full benefit of a profitable business in which he now appears to be engaged.

The libellant, although entitled to security, has acquiesced so long in Caples' use of the vessel without it, that his demand for a compulsory sale at this juncture is open to the suspicion that he is asserting his right when he may think he has Caples at a disadvantage that will compel him to buy at a high price. But it cannot be denied that Caples was in the wrong in taking the vessel away from Coyne and enrolling her and employing her in another district without giving the proper security, or at least offering to do so, when written to by Coyne as aforesaid, or even after the suit was brought, instead of which he insisted in his answer upon his right to retain the exclusive use and possession of the vessel without security or account, during his pleasure.

The decree of the court will be that within ten days Hezekiah Caples enter into a stipulation with sureties, to be approved by the clerk of this court, in double the value of J. F. and George T. Coyne's interest in said steamboat *Gazelle*, to wit, the sum of three thousand dollars, for the return thereof to this port and to the possession of the libellant on or before January 1, 1882, in as good condition as he received her after the repairs upon her machinery, necessary deterioration excepted; and unless he does so, that execution may issue against his property for the amount of said value as upon a decree of this court. And in default of said stipulation, that said vessel be sold as upon execution, and the proceeds brought into this court

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for distribution, and that upon the return of said vessel to this port as aforesaid, she may be sold and the proceeds disposed of as aforesaid upon the application of either party herein; and that the libellant recover his costs and expenses to be taxed.

UNITED STATES v. THREE TRUNKS CONTAINING 1480
SILK HANDKERCHIEFS.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 5, 1881.

1. CUSTOM AS TO MANIFEST—FORFEITURE.—Where a practice had long prevailed with the knowledge and acquiescence of the custom-house authorities, of allowing the officers and crews of steamers arriving from China to import and pay duties upon merchandise without entering it upon the manifest, and the collector, desiring to put an end to the practice, seized goods so imported, as forfeited under section 2809 of the revised statutes, and there was no evidence of a fraudulent concealment or of any design to evade the payment of duties: *Held*, that no decree of forfeiture could be passed, as it did not appear “*that there was an actual intention to defraud the United States,*” as required by section 18 of the act of June 22, 1874.

Before HOFFMAN, District Judge.

Philip Teare, United States Attorney, for United States.

G. W. Towle, Jr., for claimant.

HOFFMAN, J. The libel of information in this case is filed to enforce a forfeiture under section 2809 of the revised statutes.

That section is as follows:

“If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest, and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel shall
id.”

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The goods seized were three trunks or cases of silk handkerchiefs. They were found in the boatswain's room, and are claimed by him as his own. They were not entered on the manifest. But there does not appear to have been any attempt to conceal their presence on board from the master or the officers of the customs.

The omission to describe the goods in the manifest was not the result of mistake or accident. There does not seem to have been any intention to so describe them. They were imported under the idea that the importation was permitted by law, provided the duties were paid on the arrival of the vessel. The importation was, however, clearly illegal, and the facts of the case bring it directly within the provisions of the section which has been cited.

It is claimed, however, that the forfeiture denounced by section 2809 cannot be enforced unless it appear that there was "*an actual intention to defraud the United States.*" Section 16 of the act of June 22, 1874, in substance provides that in all suits to enforce forfeitures, etc., for any violation of the customs revenue laws, "it shall be the duty of the court to submit to the jury, as a *distinct and separate proposition*, whether the alleged acts were done with an actual intention to defraud the United States, and if the issues are tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact, and unless intent to do fraud shall be so found, no forfeiture, etc., shall be imposed."

The laws of the United States regulating commerce and navigation are necessarily rigorous in their exactions, and highly penal. They inflict forfeitures and penalties for the non-observance of their injunctions, without regard, in general, to the *motives* of the offender. (Conk. Tr. 739.) Their severity, however, was, from a very early period in the history of our government, tempered by enactments which permitted the offending or interested party to cause a summary inquiry into the facts of the case to be instituted by the district judge, by whom the facts so ascertained were to be reported to the secretary of the treasury;

and if in the opinion of that officer the penalty or forfeiture had been incurred "without wilful negligence or any intention to defraud," he was authorized to grant a remission.

These provisions were supposed, until a comparatively recent period, to afford ample protection against the rigorous application of the laws to cases of accidental and innocent violation of their provisions. The power of remission confided to the secretary has been freely and liberally exercised, nor can I recall an instance where a remission has been unreasonably or unjustly withheld.

When the violation of the law is admitted or judicially established, the burden of proof is very reasonably cast upon the offender to show that it was committed without wilful negligence or intention to defraud. And in permitting a remission after such proof is furnished, the act went as far as justice or reason requires, or as is consistent with the efficient execution of the revenue laws.

But by the sixteenth section of the act of 1874, which was passed under very exceptional circumstances, the burden of proof to show an "*actual intention to defraud the United States*," is thrown upon the government, and unless that intention is found by the jury or court "as a distinct and separate proposition," no penalty or forfeiture can be imposed. It is not sufficient under this section that the intention of the party *may* have been fraudulent. The court or jury must find that it was so in fact. This finding they can only reach when the proofs preponderate in its favor. In all cases, therefore, where the government fails to show affirmatively an "*actual intention to defraud*," judgment must be against it.

In the case at bar it is established beyond controversy that for a long series of years the practice of importing goods by the officers and crews of steamers, without entering them on the manifest, has been tolerated, and apparently recognized as legal by the custom-house authorities. The duties on such goods, when declared by the importer or found by the officers, have been paid and accepted, nor has the penalty imposed on the master ever

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been exacted or the goods seized, except when they were concealed with an evidently fraudulent purpose.

It seems to have been supposed that the laws and regulations with regard to dutiable goods found among the personal baggage of passengers could be applied to unbroken cases of merchandise imported by the officers and crews. That this practice opened a wide door to fraud is evident, and the seizure now in question is an attempt by the present collector to put an end to it. There can be no question that in many instances these importations thus sanctioned by the officers of the revenue have been made without the slightest intention to evade the payment of duties, or suspicion of their illegality. In many others they have been made with the design of smuggling the goods if opportunity offered—a design which has no doubt in very numerous cases been accomplished.

To which of these categories the importation of the goods in question in this case is to be referred I have no means of knowing. It has already been said that no concealment of them was made or attempted. The importer, a Chinese boatswain, had no reason to suppose that in omitting to have them entered on the manifest he was violating the laws. It is quite probable that he may have made many similar importations without question or objection.

Under these circumstances, I do not see how a jury or court can find as “a distinct and separate proposition” established by the proofs in the case that the importation was made “with an actual intention to defraud the United States.”

The libel of information must, therefore, be dismissed. But it must not be inferred from this decision that the law will, in all cases of this description, be found powerless to punish for the violation of its commands.

The present decision turns, in a great measure, on the fact that the importer was excusably ignorant of the illegality of his acts.

When the knowledge of the law shall have been brought home to the officers and crews of the steamers, and the custom-house authorities shall have ceased to tolerate these

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illegal importations, if they shall still be wilfully and knowingly persisted in, it will be for the court or jury to say whether such persistence is not sufficient evidence of actual intention to defraud to satisfy even the requirements of section 16 of the act of 1874.

YE SENG Co. v. CORBITT & MACLEAY.

DISTRICT COURT, DISTRICT OF OREGON.

SEPTEMBER 5, 1881.

1. AGENT, WHEN LIABLE ON A CONTRACT.—A person who signs a contract as agent without disclosing the name of his principal is liable thereon as principal.
2. AGENCY.—A person authorized to act for the charterers of a vessel, as agent, to procure a cargo in a foreign port, is not thereby authorized to modify or cancel the charter-party of his principal.
3. IMPOSSIBILITY—WHEN NO EXCUSE FOR NON-PERFORMANCE OF A CONTRACT.—The owners of a vessel chartered her to carry passengers from Hong Kong to Portland, and stipulated in the charter-party that she was "tight, staunch, and strong, and in every way provided for said voyage;" but upon her arrival at Hongkong she was found by the surveyor of the port to be "not fit to carry passengers," and refused permission to do so by the local authorities: *Held*, that the owners were not thereby excused from their contract, which was absolute and without condition, to carry passengers out of Hongkong; and that even in the absence of the stipulation in the charter-party as to the character and condition of the vessel, the law would imply from the undertaking of the owner that she was in all respects "fit" to carry passengers out of said port.
4. DAMAGES.—The charterers procured two hundred passengers to ship on said vessel out of Hongkong at rates that would have netted them fourteen dollars apiece, or two thousand eight hundred dollars in the aggregate, which gains they were prevented from making by the failure of the owners to perform their contract: *Held*, that the prevention of these gains was a damage to the charterers which naturally arose from the breach of the contract, and must also have been in the contemplation of the parties thereto, and therefore they are entitled to recover them in a suit for such breach.
5. MONEY PAID INTO COURT.—Money paid into court by a defendant is an absolute admission that so much is due upon the claim of the plaintiff and is so far a payment thereof, and the better opinion seems to be that the defendant may receive said deposit pending the litigation; and, in any event, he may prosecute his action for the remainder of his claim, subject to the risk of paying costs if he recover no more than the tender.

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Before DEADY, District Judge.

William H. Effinger, for libellants.*Benton Killin*, for defendants.

DEADY, J. The libellants, Ye Seng Co., composed of sundry Chinese merchants of this city, bring this suit to recover five thousand nine hundred and fifty-seven dollars and eighty cents from the defendants, as damages, with interest, for the non-performance by them of a charter-party, executed in this city, on August 20, 1879, for the American bark *Garibaldi*.

By the agreement "Messrs. Corbitt & Macleay, agent for owners of the American bark *Garibaldi*, of Portland, Oregon," of six hundred and seventy tons burden, chartered her "between decks" to the libellants for a voyage from Hong Kong, China, to Portland, to carry "passengers and freight" in number as permitted by the laws of the United States, upon the terms and conditions following:

"The said vessel shall be tight, staunch, and strong, and in every way fitted and provided for said voyage;" the libellants to provide at Hong Kong, the "passengers and freight as aforesaid, and furnish bunks, cook-houses, water-closets, and hatch-houses, and everything necessary to the carrying of passengers;" and to pay the defendants "for the use of said vessel" during said voyage two thousand nine hundred dollars—one half before the vessel left Hong Kong and the remainder upon her arrival at Portland; but "if no cargo and all passengers full amount payable in Hong Kong."

The "lay days for loading at Hong Kong" were to be from March 1 to April 1, 1880, and any detention caused by either party was to be compensated for by the payment to the other of demurrage at the rate of fifty dollars per day.

The charter-party contained the following stipulation: "To the true and faithful performance of all and every part of the foregoing agreement, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators, and assigns, each to the other in the penal sum of amount of charter"—that is, two thousand nine hundred dollars.

It was also stipulated that "security" should be given for the performance of this agreement in the sum of five hundred dollars, previous to the sailing of the vessel on her voyage to China.

No attention seems to have been paid to this provision, except by the libellants, who, on February 26, 1880, advanced the defendants five hundred dollars earnest money on the voyage from Hong Kong to Portland, erroneously stated in the answer to have been paid before the barque left Portland for the former place.

The agreement is signed by the libellant Ye Seng Co., and the various mercantile firms that compose the adventure, and by "Corbitt & Macleay, agents for owners."

In October, 1879, the *Garibaldi* left Portland for Hong Kong, where she arrived about the end of the year. Hop Kee, a Chinese merchant at Hong Kong, was the agent of the libellants to deliver the cargo of freight and passengers, for which he was to receive a commission of five per centum. When the vessel arrived at Hong Kong shipping was scarce and coastwise freights were high. Soon after her arrival in port, and before January 31, 1880, the master, Thomas J. Forbes, informed Hop Kee that he would not be allowed to carry passengers out of that port on the *Garibaldi*; and on January 31st she was surveyed by R. McMurdo, the "surveyor for the government and local offices," who made and furnished the master a certificate over his signature and seal of office containing a description of the vessel and the following statement under the head of "general remarks upon the vessel and the character of the risk:" "Vessel docked and metalled at date under inspection of the undersigned, now tight and in order—but not a fit vessel to carry passengers." These facts were at once communicated to the defendants by cable and mail, and they instructed the master to do the best he could with her, and she went into the coasting trade, where she remained until she was disposed of in the following July.

On February 13, 1880, Nathaniel Ingersoll, who procured the charter for the libellants, wrote Forbes from Portland, inclosing a copy of the charter-party for the use of Hop

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Kee, and telling him that Ye Seng Co. wished to be advised by mail when he was ready to sail for Portland.

On March 4, 1880, at the instance of Forbes, Hop Kee wrote across the face of the copy of the charter forwarded to him by Ingersoll—"This charter-party is cancelled in consequence of the emigration office of Hong Kong refusing to permit the *Garibaldi* to carry passengers," and signed the same "Hop Kee, agent for charterers;" and on the same date Forbes addressed a note to "Messrs. Hop Kee & Co., agents for charterers of *Garibaldi*," as follows: "In consequence of the emigration office of Hong Kong refusing to permit my ship to carry passengers, I hereby certify that you have canceled the charter-party, dated Portland, Oregon, 20th August, 1879."

(Signed) "T. J. Forbes, captain *Garibaldi*."

The libellant contests the right of Hop Kee to cancel the agreement, and the counsel for the defendants admits that the evidence does not prove it. His agency appears to have been confined to the fulfilment of the charter at Hong Kong, without any authority to modify or cancel it.

Nor will the law imply the greater authority from the less—the power to abrogate from the power to fulfil or carry out. (MacLachlan's L. of M. S. 360; *Rich v. Parrott*, 1 Sprague; 358.)

Nor is it clear that Hop Kee actually undertook to release the defendants from their obligation under the agreement, but only formally to admit the fact that as it had become impossible, as he understood it, for the defendants to perform their part of the contract, it was, in his judgment, practically at an end.

The answer of the defendants alleges that the *Garibaldi*, on August 20, 1879, was owned by "The Ocean Ship Company," a corporation formed under the laws of Oregon, and that the defendants made said charter-party as the agents of said company and not otherwise, and therefore they are not liable thereon; and on the trial it was admitted that such was the fact, and also that the stock of such corporation was substantially owned by the defendants, Kenneth and Donald Macleay.

But it also appears from the evidence, that while the defendants signed the charter-party as agents, they did not disclose the name of their principal, nor was it ever known to the libellant until after the commencement of this suit.

Under these circumstances, the liability of the defendants is undoubted. Although agents in fact, they have so dealt with the libellant as to render themselves liable as principals.

The rule of law upon the subject is clear and just. Story, in his *Agency* (secs. 266, 267), says: "A person contracting as agent, will be personally responsible when, at the time of making the contract, he does not disclose the fact of his agency. * * * The same principle will apply to contracts made by agents, when they are known to be agents, and acting in that character, but the name of their principal is not disclosed; for until such disclosure, it is impossible to suppose that the other contracting party is willing to enter into a contract, exonerating the agent and trusting to an unknown principal, who may be insolvent, or incapable of binding himself." To the same effect is the rule laid down in 2 Kent, 630; and it was expressly affirmed in *Winsor v. Griggs*, 5 Cush. 210.

In MacLachlan's L. of M. S. 355, it is laid down that one who executes a charter-party "in his own name, although he is agent for another, and notwithstanding he adds this, being merely a description of himself, whether in the body of the contract or after his signature, may sue or be sued thereon."

But it was suggested by counsel on the argument that as the *Garibaldi* appears to have been an American vessel belonging to this port, an examination of the record of her enrolment in the custom-house would have shown the fact of her ownership, and that the libellant must be conclusively presumed to have known what he might have thus learned. No authority is cited in support of this proposition, and I can hardly think it was seriously made. In any event it is radically wrong, because it assumes that it was the duty of the libellant to ascertain who, if any one, was the defendants' principal. On the contrary, it was the duty of the de-

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defendants, if they did not want to be held personally liable on the contract, to disclose the name of their principal.

However, in this case the application of the rule is not a serious matter, because the defendants—the Macleays, and “The Ocean Ship Company”—are substantially one and the same person; they own their principal, and are practically responsible for its debts and liabilities.

The libellants allege that they suffered damage by reason of the non-performance of the agreement by the defendants in this: that their agent, Hop Kee, had purchased and was ready to deliver on said vessel before March 1, 1880, two thousand four hundred and forty mats of rice of forty-six and one half pounds each, and two hundred boxes of nut oil of seventy-two pounds each, and that they had disposed of the same, to arrive at this port per the *Garibaldi*, at a net gain of eight hundred and eighty-one dollars and eighty cents—seven hundred and eighty dollars and eighty cents on the rice and one hundred and one dollars on the oil, and that before said date they had secured two hundred and sixty-five passengers for the return trip of said vessel at the rate of forty dollars per head, and would have made upon the carrying of the same, after defraying all expenses of transportation, board, etc., the net profit of four thousand and seventy-six dollars; that they were compelled to expend five hundred dollars in returning these passengers from Hong Kong to their respective homes upon the failure or refusal of the defendants to take them to Oregon; and that freights were then so high that the libellants could not procure other transportation for said freight and passengers and realize any profit thereon.

Unfortunately, Hop Kee died without his deposition being taken, and what he did in and about the carrying out of this contract is not clearly shown. However, upon the evidence in the case it does not appear that he purchased any rice or oil for the libellants as alleged, for the reason, in all probability, that Forbes told him early in January, in effect, that the *Garibaldi* would not return to Portland. Neither is the evidence satisfactory, as to the claim for five hundred dollars alleged to have been paid for returning the proposed passen-

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gers to their homes. And on the argument I understood counsel for the libellants tacitly to abandon the claim for damages on these accounts. But it does appear from the evidence that Moy Toy and Fune Gib, who were passengers to Hong Kong on the *Garibaldi*, procured, as agents or runners for the libellants, two hundred passengers for Portland at forty dollars apiece; but as the master of the *Garibaldi* had given Hop Kee notice that she would not make the voyage, he was compelled to decline to sell them tickets therefor.

It also satisfactorily appears from the evidence that there were no other means available to the libellants for transporting said passengers, and that the price of passage on the regular steamer to San Francisco was sixty dollars per head.

The transportation of two hundred passengers for two thousand nine hundred dollars—the price of the charter—would cost fourteen dollars and fifty cents, and from the evidence it appears that it would cost not to exceed twelve dollars apiece more to board and take care of them on the voyage; so that it follows that the libellants stood to make two thousand eight hundred dollars net profit on the venture, and were only prevented from doing so by the failure of the defendants to keep their contract and make the promised voyage.

The libellants have at least sustained a loss of two thousand eight hundred dollars in gains prevented by this failure of the defendants to keep their contract, and, in my judgment, they are such damages as arise naturally from the breach of the contract, and must also be considered as within the contemplation of the parties thereto when they made it; and are, therefore, recoverable in this suit. (*Hadley v. Baxendale*, 9 Exch. 341; *Griffin v. Colver*, 16 N. Y. 489; *Ogden v. Marshall*, 4 Selden, 340; Sedg. Dam. 79.)

The stipulation in the charter that either party shall be liable to the other in the penal sum of two thousand nine hundred dollars upon a failure to perform any part of the agreement, was intended, in contemplation of law, not as a measure of damages, but as a penalty, to be enforced only

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to the amount of the actual damages sustained by such failure. (*Harris v. Miller*, 6 Saw. 319; Sedg. Dam. 399, 421, n. 1.)

But this being a suit, not for the penalty, but upon the covenants in the contract for damages for a breach thereof, the amount recovered may exceed such penalty. (*Lowe v. Peers*, 4 Burr. 2225; *Harrison v. Wright*, 13 East, 343; *Winter v. Trimmer*, 1 Black. 395; Abb. on Ship. 285; Sedg. on Dam., 423.)

In their answer, the defendants allege, that the parties were mutually released from the obligation of the charter-party, by reason of the alleged cancellation of the same by the master and Hop Kee; but it not appearing that the latter had authority to make such cancellation, that defense is abandoned, and it is now insisted that the contract to furnish and receive freight and passengers on the *Garibaldi*, at Hong Kong for Portland, was a contract so far, to be performed in the former place, and being prohibited there, it was invalid, and therefore bound neither party to it.

But this proposition assumes what is not proven. There is no evidence that it was unlawful to carry passengers out of Hong Kong on a suitable vessel—one that was “stanch and strong” and reasonably safe for them to venture their lives upon. The defendants expressly covenanted in the charter-party that the *Garibaldi* was such a vessel, and in such condition; and if they had not, the law would imply a covenant on their part that the vessel was “fit” to do what they undertook to do with her—carry passengers out of Hong Kong. (*MacLachlan's L. of M. S.* 406; *The Merrimac*, 2 Saw. 593; *Lyon v. Mills*, 5 East, 428; *Stanton v. Richardson*, 9 C. P. 390; 1 Pars. S. & A. 284.)

Nor was the duty or responsibility of the defendants in this respect affected by the fact that the agent of the libellants for the negotiation of the charter may have known or did know the condition of the *Garibaldi* at the date of the charter-party because he surveyed her a year before, or for any other reason. (1 Pars. S. & A. 285, n. 3.) They undertook without qualification or condition that the vessel was “fit,” not only to carry passengers generally, but also out

of the port of Hong Kong, according to the laws and regulations thereof.

The *Garibaldi* appears to have been built at Stockton, California, in 1860, and had been engaged for some years in carrying passengers between Hong Kong and this port.

By the survey at Hong Kong, in January, 1880, she was found “not fit” to carry passengers; probably on account of weakness resulting from age.

Hop Kee told the Chinese runners when they came to him to purchase tickets for the passage out, that the *Garibaldi* would not take them, because Forbes said she was too old. The certificate says she is “tight and in good order,” but omits to say that she is “stanch and strong” as represented in the charter-party. And it may be that the master did not object to the vessel being found unfit to carry passengers to Oregon, if she was thereby free to engage in a more profitable trade on the coast of China, where, according to the testimony of Noyes, the mate, she earned one thousand four hundred dollars in a voyage of a few days. Counsel for the defendants also object that the certificate of the marine surveyor is not competent evidence of the unfitness of the *Garibaldi* to carry passengers. But it was an official act procured by the defendants, upon the strength of which the emigration office, according to the written statement of the master delivered to Hop Kee, refused to permit the vessel to carry passengers out of the port.

If the certificate is true, as *prima facie* it is, then undoubtedly the defendants failed to keep their agreement that “the said vessel shall be tight, stanch, strong, and in every way fitted and provided for said voyage,” and if it is not true, and the order thereon refusing to permit the *Garibaldi* to carry passengers was wrongfully made, the result is the same; because the defendants not only undertook that their vessel was in a condition to carry passengers out of Hong Kong, but that she would do so without any qualification or condition—as that she should be found qualified or permitted to do so by the local authorities.

In *Paradine v. Jane*, Aleyn, 26, the court said: “When the party by his own contract creates a duty or charge upon

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himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have guarded against it by his contract."

In *The Harriman*, 9 Wall. 172, the supreme court say: "The principle deducible from the authorities is, that if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. The answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation;" and cite with approbation *Blight v. Page*, 3 Bos. & Pul. 295, where Lord Kenyon held, that a charterer who agreed to load a vessel with barley at Liebean, but did not, because the Russian government had forbidden the exportation of barley, was liable for the breach of his contract, saying: "If a man undertake what he cannot perform, he shall answer for it to the person with whom he undertakes. I am always desirous to apply the settled principles of the law to the regulation of commercial dealings."

To the same effect is the ruling in the case of *West v. Steamer Uncle Sam*, McAllister, 505, and the citations and comments in MacLachlan's L. of M. S. 543. But if this certificate and the letter from the master to Hop Kee of March 4th, are not *prima facie* evidence of the facts that the vessel was found unfit to carry passengers, and the refusal thereon of the local authority to allow her to sail with them, what becomes of the defense that this contract could not be performed by the defendants, because it was contrary to the law of the place of performance—Hong Kong? This certificate and letter are the only evidence of such illegality, and without them there would be no pretence of an excuse for the non-performance of the contract on the part of the defendants.

It is also alleged in the answer and testified to by the master that when he arrived in Hong Kong, Hop Kee told him that he had not secured any freight or passengers for the *Garibaldi*, and upon this it is claimed that the libellants were first in fault, and this was the controlling reason why

the contract was considered at an end by the master and Hop Kee. But admitting that Hop Kee had not secured any freight or passengers when or before the *Garibaldi* arrived at Hong Kong, it does not follow by any means that the libellants were therefore in fault in this matter. It was not agreed or expected that the freight or passengers would be engaged by the arrival of the vessel in December or January. Indeed, the libellants had until the first of April to load the vessel, and as much longer as they chose, by paying the demurrage agreed upon, while the defendants were not bound to be in port or receive cargo before the first of March.

It may be, then, that Hop Kee, when asked by the master in December or January, said he had not secured any freight or passengers, but that does not prove that he did not intend to or would not before the expiration of the lay days. How could he be expected to have procured a cargo, when, so far as appears, his instructions to do so went out on the *Garibaldi*? That he did not afterwards procure the rice and oil and accept the passengers that Moy Toy and Fune Gib had engaged in the mean time, was doubtless due to the fact that, in a few days thereafter, the master told him, in effect, that the vessel would not return to Portland.

The answer admits the liability of the defendants, as agents of the owners, to repay the five hundred dollars received by them as earnest money; and therewith they brought into court five hundred and sixty-two dollars and thirty-three cents, that being the amount with interest and costs of suit to date—December 3, 1880—and “tendered the same to the libellants,” who received the amount from the clerk on December 23d.

It is now contended, that this sum was tendered in full of all claims in this suit, and that the acceptance of it by the libellants, is a satisfaction of the whole claim, and a bar to any further recovery.

A payment of money into court, without a plea of a previous tender, operates as a tender from that date, and admits so much of the cause of action. But the plaintiff is not thereby precluded from prosecuting his action for the

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remainder of his claim, although he cannot recover costs, if he fails to recover more than the sum tendered, and may be required to pay them.

But whether the plaintiff may take this money out of court pending the litigation, either of his own motion or by leave of the court, is a question. In *Alexandria v. Patten*, 1 Cr. C. C. 294, it was said by the court, without argument, that on a plea of tender the plaintiff cannot take the money out of court and proceed for more; and in 2 Pars. S. & A. 486, it is said, "The practice in the English admiralty is, when money is paid into court as a tender, not to pay it out until the conclusion of the case;" citing *The Annie Childs*, Lush. Adm. 509.

But in *Murray v. Bethune*, 1 Wend. 191, it was held that when money is brought into court, pending an action for the same and more, it is a payment *pro tanto*, and the plaintiff has a right to take it out, but the defendant has not. And this in my judgment is the more convenient, and therefore the better rule. The deposit in court is an unconditional admission that such an amount is due, and a tender of the same and more—for it is so far a payment beyond the power of the party to recall. (See also *Spalding v. Vandercook*, 2 Wend. 431; *Sleght v. Rhineland*, 1 Johns. 202.)

By reason of the failure of the defendants to perform their contract, the libellants have suffered damage, and are entitled to recover at least the two thousand eight hundred dollars gains, which they were thereby prevented from making on the transportation of the two hundred passengers engaged for the voyage, with interest from the date the *Garibaldi* might have completed the voyage to this port—say June 1, 1880—amounting in all to three thousand one hundred and seventy-three dollars and thirty-three and one third cents, with the costs and expenses of suit.

There will be a decree accordingly.

Points decided.

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LEANDER HOLMES, ADMINISTRATOR OF PERKINS, v.
OREGON AND CALIFORNIA RAILROAD CO.

CIRCUIT COURT, DISTRICT OF OREGON.

OCTOBER 20, 1881.

1. THE COUNTY COURTS OF OREGON are, under the constitution and laws of Oregon, courts of record; and their records are entitled to the same faith and credit as is attributed to the records of other superior courts.
2. THE COUNTY COURTS, under the constitution of Oregon, have general jurisdiction of probate matters, to be limited and regulated by statute, in accordance with the constitution.
3. SAME.—Under the statutes of Oregon, letters of administration upon the estates of persons dying without a will are to be granted by the county court of the county of which the intestate was an inhabitant at or immediately before his death upon the presentation of a petition to the court alleging the necessary facts, including the fact of such inhabitancy.
4. JURISDICTION, WHAT IS.—Where the petition for letters of administration alleges all the facts necessary to give the court jurisdiction, the court is required to inquire into the truth of the facts so alleged, and is authorized to determine and adjudicate thereon; and such authority to inquire and adjudge is *jurisdiction*.
5. JURISDICTION—CONCLUSIVE ADJUDICATION.—Where the petition properly alleges that the intestate was an inhabitant of the county in which the petition is filed at or immediately before his death, together with all other necessary facts, and the court, upon such proper allegations and satisfactory proofs, adjudges the facts so alleged to be true, and issues letters of administration thereon, the adjudication of the fact of inhabitancy so made is conclusive, and the truth thereof cannot be controverted collaterally in any other proceeding. The judgment concludes further inquiry as to the jurisdictional fact by deciding it.
6. SAME.—The judgment in such case has the same conclusive effect as the judgment of a court of record of the United States upon the allegation in a complaint or bill in chancery of the jurisdictional fact of citizenship, or the judgment of a state court of record upon the jurisdictional fact of the place where the crime was committed alleged in the indictment.
7. PROCEEDING IN REM.—The proceeding for the appointment of an administrator is in the nature of a proceeding *in rem*, to which all the world is a party, and all the world is estopped by the adjudication thereon.
8. THE CASE OF THOMPSON v. WHITMAN, 18 Wall. 457, and the cases therein cited, commented on and distinguished.
9. JURISDICTIONAL FACTS NOT CONCLUSIVELY DETERMINED.—Where the court is required to do some act through its ministerial officers or other lawfully appointed agencies, in order to acquire jurisdiction of the person or of the thing in a matter constituting a complete pre-existing cause of action—such as serving a summons on a party within the state, or seizing a thing within its territorial jurisdiction—the acts so to be performed

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by or on behalf of the court to give it jurisdiction are jurisdictional facts; and the determination of that class of jurisdictional facts by the court assuming jurisdiction is not conclusive, but the truth of such jurisdictional facts may be controverted in a collateral proceeding.

10. **APPEAL—AMOUNT IN CONTROVERSY.**—Where the statute in express terms limits a recovery to five thousand dollars, that sum is the highest amount in controversy, and there is no appeal.
11. **SECOND ADMINISTRATOR.**—The appointment of an administrator while there exists a legal administrator is void.

Before **SAWYER**, Circuit Judge.

ON petition for rehearing. This is an appeal from a decree of the district court in a suit to recover the sum of four thousand nine hundred dollars, under section 367 of the Oregon civil code, on account of the death of William A. Perkins, which occurred on November 16, 1878, and which is alleged to have been caused by the negligence of the defendant while transporting the said Perkins across the Wallamet river, at Portland, on its steam ferry. On the day named the deceased, then in his twenty-second year, in company with his mother, Mary A. Riggs, left Salem, Oregon, for Portland, in the same state, intending to take the steamer at the latter place for California. In crossing the Wallamet river, on defendant's ferry, while landing at Portland, in Multnomah county, he fell overboard and was drowned. Soon after, said Mary A. Riggs, mother of the deceased, who was the next of kin, and one of his heirs at law, and entitled to letters of administration under the laws of Oregon (Or. Code, sec. 1053), filed a verified petition in the county court of Multnomah county, in which she styled herself Mary A. Riggs, of the city of Portland, and alleged that William A. Perkins died on November 16, 1878, in said Multnomah county and state of Oregon; "that deceased was at, or immediately before his death, an inhabitant of said county;" that he left as assets the claim now sued upon, and no other property; that he left no creditors and no will; that she herself, the mother of said deceased, "residing in said city of Portland," two minor half-sisters, who "reside with your petitioner in said city," and a minor brother residing in Cambridge, Vermont,

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were the only next of kin, and heirs at law of the said intestate. The petition alleges all other jurisdictional and necessary facts, and in said petition, petitioner expressly renounced her right to administer upon the estate of deceased, and prayed the court to grant letters of administration to H. W. Davis, whom she alleged to be a fit and competent person to administer upon said estate. Acting upon said petition, the county court of Multnomah county, at a regular term of said court, on December 16, 1878, in an order made and entered in the records, in which it was recited, that it was "proved by the oath of the petitioner, Riggs, that the said William A. Perkins died on or about the sixteenth day of November, 1878, intestate, in the county of Multnomah, and state of Oregon, being at, or immediately before his death, an inhabitant of said county," etc., ordered that letters of administration on the estate of said intestate be issued to H. W. Davis; and letters were accordingly issued, and said Davis qualified and entered upon his duties as such administrator—the proceedings being all in due form and regular upon their face. The said order and appointment are still unrevoked and in full force. Afterwards, on January 2, 1879, said Davis, as such administrator, brought an action at law against the defendant in the circuit court of Oregon, under section 637 of the code of Oregon, for the identical cause of action alleged in the libel herein, in which issue was joined, and in which there was a trial by jury, and a verdict in favor of the defendant, upon which verdict a final judgment was regularly entered on March 31, 1879. Said judgment was afterwards duly affirmed on appeal by the supreme court of Oregon on August 11, 1879; and it still remains in full force and effect. Afterwards, Sidney Dell, who had been the attorney of Mrs. Riggs, and said administrator, Davis, in the said prior proceedings, filed a petition, as petitioner, in the county court of Jackson county, Oregon, in which it is alleged, "that deceased was at and immediately before his death an inhabitant of said county of Jackson in said state of Oregon;" that the same parties mentioned in the said prior petition were next of kin, and heirs at law, etc.; that the said cause

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of action, was the only estate of deceased; that there were no creditors; that more than forty days had elapsed since the death of the intestate, and neither the widow, next of kin, nor any creditor had "made application within that time to this court for letters of administration," and praying that Leander Holmes be appointed administrator, whereupon said Holmes was appointed such administrator on September 17, 1879. Holmes, having qualified and received his letters, filed the libel in this suit, for the identical cause of action brought by Davis, administrator, in the state court. In addition to the issue taken on the case made by the libel, the defendant sets up as defenses: 1. That libellant was never administrator; 2. The prior adjudication in the state courts.

Sidney Dell, for libellant.

Dolph, Bronaugh, Dolph & Simon, for defendants.

SAWYER, Circuit Judge, after stating the facts. At the hearing at the last term, although the court intimated that its impressions were against the libellant upon other points, the case was in fact decided upon the first point set out in the statement—that the libellant was never administrator. This point has been thoroughly and ably argued and reargued, and I have given it that careful consideration which the importance of the case, and of the principle involved, deserves.

Whether the libellant is administrator, depends upon the question: first, whether the appointment of Davis, who was appointed by the county court of Multnomah county, and whose appointment, if legal, was still in force, was valid; and if not, then, whether the intestate was in fact an inhabitant of Jackson county, "at or immediately before his death." As to the first point: The appointment of an administrator of an estate, while there is already a legal administrator, is void. The title to all the estate having already vested in the existing administrator for the purposes of administration, there is no estate in existence which can vest in the second appointee by virtue of his appointment. There is no subject-matter upon which he can act. (*Griffith*

v. *Frazier*, 8 Cranch, 9; *Kane v. Paul*, 14 Pet. 33; *Haynes v. Meeks*, 20 Cal. 288; *Hamillon's Estate*, 34 Id. 464.) Was Davis, then, administrator at the time of libellant's appointment?

The only ground of invalidity in the appointment of Davis, alleged and relied on by libellant, is, that Perkins, "at or immediately before his death," was not in fact an inhabitant of Multnomah county, and the county court of that county had no jurisdiction to make the appointment; and, it is insisted, that the appointment for that reason is absolutely void.

The first point to be considered, then, is, is the question of inhabitancy open to examination on a collateral attack?

Section 1, article VII of the constitution of Oregon, so far as it relates to county courts, is in the following language: "The judicial power of the state shall be vested in a supreme court, circuit courts, and *county courts which shall be courts of record*, having *general jurisdiction*, to be defined, limited, and regulated by law in accordance with this constitution." (Gen. Laws Or., p. 87.) Thus, the people of Oregon, in their fundamental law, have relieved the county courts of the badge of inferiority in the technical sense of that term, and made them courts of record—superior courts—and so far as the sanctity of their determinations, and the faith and credit due to their records are concerned, placed them upon a plane of equal dignity with the circuit and supreme courts. The general jurisdiction is conferred, and the character of the court fixed in the same section and in the same language as that which fixes the *status* of the other courts. The same effect must, therefore, be given to their determinations upon collateral attack, and the same inviolability attributed to their records as to the records of the circuit courts, or of the supreme court itself. This point is, also, settled by the decision of the supreme court of Oregon. (*Tustin v. Gaunt*, 4 Or. 306.) The character and dignity of the county court having been thus defined and established, section 12, of the same article of the constitution, provides that, "The county court shall have the jurisdiction pertaining to probate courts," etc., thus confer-

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ring in general terms upon the county court general jurisdiction over the subject-matter of the estates of deceased persons. In regulating the exercise of this general jurisdiction thus conferred, in pursuance of the provisions of section 1, article VII, of the constitution before cited, the statute provides: that the administration of the estate of an intestate shall be granted by the county court when the intestate "at or immediately before his death was an inhabitant of the county, in whatever place he may have died." (Or. Civ. Code, secs. 1051, 1052.) Section 1060 provides: "In an application * * * for the appointment of an administrator, the petition shall set forth the facts necessary to give the court jurisdiction." In this case, as has been seen, the facts were all properly set forth, and it was distinctly alleged in the petition that the intestate was, "at or immediately before his death, an inhabitant of Multnomah county."

This averment presented the issue as to inhabitancy to be determined, and the court did in fact determine and adjudge it upon evidence under oath, and its judgment on its face contains the recital: "It being proved by the oath of the petitioner, Riggs, that the said William A. Perkins died on or about the sixteenth day of November, 1878, intestate, in the county of Multnomah, and state of Oregon, *being at or immediately before his death an inhabitant of said county.*" Can this determination be re-examined in a collateral proceeding, and if found erroneous, treated as a nullity, on the ground that the court was without jurisdiction? To resolve this question it must be determined what jurisdiction is. The supreme court of the United States has repeatedly defined jurisdiction. In *Grignon's Lessees v. Astor*, 2 How. 338, the supreme court, quoting from a prior case, says: "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner presents such a case in his petition, that, on a demurrer, the court would render a judgment in his favor, it is an undoubted case of jurisdiction. Whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes

out his case, is the exercise of jurisdiction, conferred by the filing of a petition containing all the requisites, and in the manner required by law. (6 Pet. 709.) Any movement by a court is necessarily the exercise of jurisdiction; so to exercise any judicial power over the subject-matter and the parties, the question is, whether, on the case before the court, their action is judicial or extrajudicial, with or without authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction, what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it. (12 Pet. 718; 3 Id. 205.) It is a case of judicial cognizance, and the proceeding is judicial. (12 Id. 623.)"

The court further says: "No other requisites to the jurisdiction of the county court are prescribed than the death of Grignon, the insufficiency of his personal estate to pay his debts, and a representation thereof to the county court where he dwelt, or his real estate was situate, making these facts to appear to the court. Their decision was the exercise of jurisdiction, which was conferred by the representation; for whenever that was before the court, they must hear and determine whether it was true or not. It was a subject upon which there might be judicial action. The record of the county court shows that there was a petition representing some facts by the administrator, who prayed an order of sale; that the court took these facts which were alleged in the petition into consideration, and for these and divers other good reasons, ordered that he be empowered to sell." (Id. 339.) And again (page 340): "The petition in the present case called for a decision of the court that the facts represented did or did not appear to them to be sufficiently proved; they decided that they did so appear, whereby their power was exercised by the authority of the law, and it became their duty to order the sale," etc. * * * "The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and *whether they existed or not is wholly immaterial, if no appeal is taken*; the rule is

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the same whether the law gives an appeal or not, if none is given from the final decree it is conclusive upon all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it." And again, quoting Chief Justice Marshall in *Ex parte Watkins*, 3 Pet. 202, 203: "A judgment in its nature concludes the subject in which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as a judgment of this court would be. It is as conclusive in this court as it is in other courts. *It puts an end to all inquiry into the fact by deciding it.*" This definition of jurisdiction, and these views have been reiterated and affirmed over and over again by the supreme court, and I am not aware that they have ever been modified or questioned. (See *Ex parte Watkins*, 3 Pet. 205; *United States v. Arredondo*, 6 Pet. 709; *In re Bogart*, 2 Saw. 401.) The doctrine and the case of *Grignon's Lessees* is affirmed in *Florentine v. Barton*, 2 Wall. 216, in which the court says: "The petition of the administrator, setting forth that the personal property of the deceased is insufficient to pay such debts, and praying the court for an order of sale, brought the case fully within the jurisdiction of the court. It became a case of judicial cognizance, and the proceedings are judicial. The court has power over the subject-matter and the parties." How did the court get jurisdiction? Not merely by the actual existence of the jurisdictional facts, but by their averment in the petition, and, "The court having" [by such representation] "the right to decide every question which occurs in a cause, whether the decision is correct or otherwise, its judgment, until reversed, is binding on every other court." (Id.) * * * "This proposition will be found fully discussed at length, and fully decided by us in *Grignon's Lessees v. Astor*. Any further argument in vindication of them would be superfluous." (Id.) Affirmed again in *Comstock v. Crawford*, 3 Wall. 406, 403. (See also *Caujolle v. Ferrie*, 13 Wall. 465; *McNitt v. Turner*, 16 Wall. 363, 366.) In the very late case

of *Mohr v. Manierre*, 101 U. S. 424-5, the supreme court by Mr. Justice Field, citing *Grignon's Lessees*, says: "This court, however, held that no other requisites to the jurisdiction of the county court were prescribed by the statute than the death of the intestate, the insufficiency of his personal estate to pay his debts, and a representation of the facts to the county court where he dwelt, or his real estate was situated; that the decision of the county court upon the facts, was the exercise of jurisdiction which the representation conferred; and that the decision could not be collaterally attacked by reason of them. The court observed in substance * * * that it was sufficient to call its powers into exercise; that the petition stated the fact upon the existence of which the law authorized this sale; that the granting of the license was an adjudication that such facts existed," etc., and again: "The statute declared that upon the existence of certain facts the sale of the lunatic's estate might be made, and when these appeared in the petition of the guardian, the court had jurisdiction to act, so far as his rights were concerned, as fully as if the statute has so declared in terms, whatever may be the effect of its proceedings upon the interests of parties not properly brought before the court." (Id. 426.) Thus in that case the principle so often repeated, is again recognized and asserted, that when the jurisdictional facts are all alleged in the petition, the court has jurisdiction to act upon them; that the determination of the truth or falsity of those facts is judicial action, in the exercise of jurisdiction, and is conclusive when brought collaterally before another court. Try the case under consideration by the tests thus repeatedly laid down, and reasserted and reaffirmed over and over again by the supreme court for a period of more than fifty years. Did not the "petitioner present such a case in her petition, that on demurrer the court would render judgment in her favor?" There can be but one answer to this question. Then, says the supreme court, "it was an undoubted case of jurisdiction." Was the court required to act upon the
? Then "any movement of the court" in acting was "the exercise of jurisdiction." The law, as

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we have seen, required a petition stating the jurisdictional facts to be presented to the court, and required the court to act upon it. The proper representation of the fact of inhabitancy in the petition is strictly jurisdictional. The actual existence of the fact jurisdictional only *sub modo*. The determination of the truth of the representation depends upon evidence and the exercise of jurisdiction. (See *Haggart v. Morgan*, 5 N. Y. 429.) The petition filed in this case represented all the jurisdictional facts.

"The decision upon it," says the supreme court, "was the exercise of jurisdiction which was conferred by the representation;" for "whenever that was before the court, they must determine whether it was true or not." "It was a subject upon which there might be judicial action." The determination and granting letters "is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken. The rule is the same, whether the law gives an appeal or not. If none is given from the final decree, it is conclusive on all whom it may concern. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtained it." (2 How. 340.) The court certainly had power, because it was required to do so, to act upon the petition of Mrs. Riggs, and determine the truth of the matters alleged, and to make a decree to give effect to that determination. Otherwise, to what end is it to consider the petition at all? And in the language of Chief Justice Marshall, "The judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. * * * It puts an end to all inquiry into the fact by deciding it." Those are the conditions found in this case; and such must be the result unless the law, as it has been recognized and enforced in the supreme court of the United States for more than half a century, is to be abrogated. The court, certainly, was author-

ized to adjudge and decree whether, upon the petition and proofs, Perkins was an inhabitant of Multnomah county at or immediately preceding his death or not. It was required by the statute to determine that question. No court in the state could act at all in such a case without making this inquiry. No court could know how the actual fact was by intuition, or take judicial notice of it. There must be proper allegations and proof, which the court must consider; and the inquiry must, in the nature of things, rest on antecedent authority to inquire. That authority is jurisdiction, and the inquiry judicial action within the jurisdiction. The correct determination of the fact depends upon the truthfulness of the evidence, and correct deductions from it; and in both particulars there is liability to error. It seldom happens, that disputed facts can be determined with absolute certainty. The evidence upon different trials of the same issues of fact may be entirely different, and not only justify but absolutely require different determinations, and different adjudications. Different minds may make different deductions from the same evidence, where there is room for doubt. But the peace and interests of society require that there should be an end to litigation. Hence the rule, as important to the well-being of society as any known to the law, that a question of fact once determined and adjudged, by a court having authority to make the inquiry and adjudication, is conclusively determined, unless the judgment is set aside on appeal to some higher court, or upon some direct proceeding within the recognized rules of law to annul it. In this case, in my judgment, the county court of Multnomah county had jurisdiction upon the petition filed to hear evidence, and inquire into, determine, and adjudge the fact of inhabitancy of Perkins at or immediately before his death; and having made the inquiry, and determined and adjudged the fact, the judgment is "conclusive on all the world," and "puts an end to the inquiry concerning the fact by deciding it." The petition for the appointment of an administrator, and the proceedings thereon, are in the nature of proceedings *in rem*. "All the world was a party" to the proceedings, and, consequently,

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all the world is estopped by the adjudication thereon. (*Grignon's Lessees*, 2 How. 338.)

The broad principle urged by libellant's counsel, that the question of Perkins' inhabitancy is strictly jurisdictional, and that all jurisdictional facts, notwithstanding they have been heard and determined on proper allegations and evidence in the courts called upon to act in the matter, are still open to inquiry, collaterally, in the same or other courts, would render the adjudications of nearly all private cases in the national courts inconclusive, and open to collateral attack. The national courts, while, technically, courts of record and superior courts, are yet courts of limited jurisdiction. This has been often so determined by the supreme court, and it is only necessary to read the constitution and statutes conferring jurisdiction to perceive it. In private cases, the jurisdiction usually depends either upon the citizenship of the parties, or whether the case arises under the constitution and laws of the United States. In the former case the jurisdictional fact of citizenship must be alleged, and, if denied, proved. In the latter class there is often a difference of opinion as to whether the case arises under the constitution or laws of the United States. Are the questions of citizenship, and whether the case is one arising under the constitution and laws of the United States—the jurisdictional facts—when once adjudicated upon proper allegations and proofs, to be ever after open to examination and repeated re-examinations, at the pleasure of the parties, whenever they are brought, collaterally, before the same or other courts? They certainly are, if the libellant's proposition can be maintained, for they are jurisdictional facts in the same sense and precisely of the same kind of jurisdictional facts as the inhabitancy of Perkins. Citizenship, as a jurisdictional fact, is precisely similar to inhabitancy. They are established when controverted by similar evidence, and one is as easily proved as the other. To give the national courts jurisdiction, on the ground of citizenship, the opposing parties must be either citizens of different states, or one must be a citizen and the other an alien. Unless this condition exists, the court has no juris-

diction, and the court in which the case is brought must necessarily determine for itself whether the jurisdictional fact exists or not. When this jurisdictional fact is alleged in the pleadings, established to the satisfaction of the court, and determined by it, its adjudication upon the fact is conclusive, and it has been so distinctly decided and settled by the supreme court of the United States in *Ervin v. Lowry*, 7 How. 180. I am not aware that the proposition has ever since been questioned. The supreme court has gone so far as to hold, that in judgments of the circuit courts, being courts of record, this question cannot be collaterally raised upon a record which does not even aver the jurisdictional facts. (*McCormick v. Sullivan*, 10 Wheat. 199; *Kennedy v. The Bank of Georgia*, 8 How. 611-12. See also *Skillern's Executors v. May's Executors*, 6 Cr. 267; *Washington Bridge Company v. Stewart*, 3 How. 424.) It is also settled, that the averment of citizenship can only be traversed by a plea in abatement to the jurisdiction. If not so controverted, it is deemed conclusively established. (*Smith v. Kernochen*, 7 How. 216; *Jones v. League*, 18 Id. 81; *De Sobry v. Nicholson*, 3 Wall. 423; *Evans v. Gee*, 11 Pet. 83; *Wickliffe v. Owings*, 17 How. 48; *P. W. & B. R. Co. v. Quigley*, 21 Id. 214.) Thus, unless a special plea to the jurisdiction, putting in issue the allegation of the jurisdictional fact of citizenship, is interposed, the jurisdictional fact is conclusively admitted on the record, whether it exists or not, and there can be no doubt that the adjudication upon that fact would be conclusive in all other courts in a collateral proceeding.

The place of the commission of all crimes is a jurisdictional fact which must be alleged in the indictment. The offence must be committed within the territorial jurisdiction of the court, or it cannot take cognizance of it. Section 22 of the Oregon criminal code (Gen. Laws, 343) provides that, with certain specified exceptions, "all criminal actions must be commenced and tried in the county where the crime was committed." The fact that the crime was committed within the county for which the court is held is, then, a jurisdictional fact in the same sense as in-

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habitaney in the case of an intestate, except that the language in reference to crime as a jurisdictional fact is more of a mandatory character in form of expression. The indictment must allege this jurisdictional fact, and if it is controverted, it must be proved. Will it be said, when this fact is alleged in an indictment and proved to the satisfaction of the court and jury, that the adjudication thereon by the court is not conclusive, because it turns out that the offence was not in fact committed in the county, or at any other place within the territorial jurisdiction of the court? I apprehend not. Yet if there is error in the verdict on this point, the jurisdictional fact does not exist in the same sense that it is non-existent in the case of the inhabitaney of an intestate at or immediately before his death, when there has been an erroneous determination of the fact upon proper allegations and proof. In both cases the court was authorized and required upon the pleadings and proofs to inquire into and determine that fact. If the determination is conclusive in the one case, it must be in the other. Suppose four or more counties corner together, as they well may, and a murder is committed at or near the common point in a state where the indictment must be found and tried in the county where the crime was committed, the evidence being conflicting as to the county in which the offense was in fact committed, and the party charged is tried, found and adjudged guilty upon an indictment containing proper allegations of the jurisdictional facts and hanged, are the judge and jury who tried the case, and the sheriff who executed the prisoner convicted—I will not say murderers—but guilty of taking the life of a citizen upon a proceeding absolutely void, and without the authority of law? Or, suppose the party charged is indicted and tried in the wrong county and acquitted upon the sole ground that the homicide was committed in self-defense, can he be again indicted for the same offense in each of the four or more other counties, and acquitted on the same ground, until the last, which is in fact the proper county, and there convicted and hanged? Such might be the result if the jurisdictional fact is not conclusively determined in the first

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case, and the judgment therein is void for want of jurisdiction. On a second indictment in another county, the plea of former acquittal would not avail if the court had no jurisdiction to try the case. If the judgment is void for one purpose on that ground, it must be void for all. The party charged would not be twice in jeopardy, for he cannot be in legal jeopardy when the court has no jurisdiction to act in the case and its action is a nullity. Void things are as no things. A conviction on an insufficient indictment is not a bar to a second indictment, because on an insufficient indictment the party is not in jeopardy. (*United States v. Gilbert*, 2 Sum. 39; Whart. Cr. Pl. & Pr., 8th ed., sec. 507.) So also there is no jeopardy when the jury is discharged without rendering a verdict for sufficient cause, as death or insanity of a juror, or where it is found impossible for the jury to agree. (*United States v. Perez*, 9 Wheat. 579; *United States v. Haskell*, 4 Wash. 410.) In the *Case of Vaux*, 4 Co. 40-47, the court held "that the reason of *autre fois acquit* was because where the maxim of the common law is that the life of a man shall not be twice put in jeopardy for one and the same offence; and that is the reason and cause why *autre fois* acquitted or convicted of the same offence is a good plea; yet it is intended of a lawful acquittal or conviction, for if the conviction or acquittal is not lawful his life was never in jeopardy. (2 Sumn. 41.) If it is not lawful to convict a man on an insufficient indictment, and for that reason the party so convicted is not in jeopardy, it is, certainly, not lawful to convict him by a court that has no jurisdiction to try the case, and whose judgment can be set aside as void collaterally; and a conviction by such a court cannot put the person in jeopardy. The close of the term of the court under the statute pending a trial, also justifies a discharge of a jury, and the party is not in jeopardy, because a continuance of the trial after the close of the term would be unlawful. The court has no authority to proceed. Its judgment would be unlawful, and the party not put in jeopardy. (Whart. Cr. Pl. & Pr., sec. 513.) *A fortiori* a judgment of a court without jurisdiction would be void and there would be no jeopardy.

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Repeated indictments and trials in different counties under the circumstances I have suggested would be absolutely monstrous. Yet evidence may be had at one time that cannot be got at another. The proofs may be entirely different on different trials, and the verdict on each trial justified by the evidence on that trial, though the verdicts on the several trials may be different. There can be but one safe and logical rule on this point applicable to the class of jurisdictional facts referred to, and that is where the petition, complaint, bill, or indictment alleges the jurisdictional facts, and the court is authorized and required upon the allegations and proofs, or admissions of the pleadings, to determine the truth of the allegations, it has power to give effect to its determinations by its judgment or decree, and having power to thus determine, adjudge, and decree, its adjudication is conclusive.

This very case presents a striking illustration of the necessity of the rule making similar determinations conclusive. On the death of Perkins, his mother, who was next of kin and one of his heirs at law, and the one to whom the law gave the first right to administer, filed her petition in the county court of Multnomah county, alleging that deceased was an inhabitant of Multnomah county at or immediately before his death, and the court upon the petition and satisfactory evidence so adjudged, and upon her request issued letters of administration to Davis. Davis immediately brought an action in the state court for the cause of action set up in the libel, and there was a jury trial, verdict, and judgment against him, which judgment was affirmed on appeal by the supreme court.

A stranger then, acting upon the theory that the proceedings in Multnomah county are void for want of jurisdiction, on the grounds that Perkins was not an inhabitant of that county at or immediately before his death, but a resident of Jackson county, filed a petition in the county court of the latter county alleging the jurisdictional facts, and thereupon the county court of that county issued letters of administration to libellant, who commenced this suit. The petition in the latter case does not allege that no letters of adminis-

tration had been issued, but only that "no application has been filed in this court"—the county court of Jackson county—leaving it to be inferred that administration may have been had elsewhere. Upon the trial of this case in the court below, the district judge was of the opinion that Perkins, at or immediately before his death, was not in fact an inhabitant of either Multnomah or Jackson county, but of Marion county. I have read the evidence, and I am strongly inclined to think that deceased was not an inhabitant of Jackson county at or immediately before his death; but I do not decide that point for the reason that the case was submitted on the question of the conclusiveness of the proceedings in Multnomah county, and the question of inhabitancy was not argued, and it is not necessary to determine the fact on this petition for rehearing. I merely refer to the point for the purpose of illustration. If I should hold the proceedings in question inconclusive, and then, as I probably should, also find that Perkins was not an inhabitant of Jackson county at the time required, and decide the case against libellant on that ground, then some other stranger, moved by the parties in interest, might file a petition in the county court of Douglas county, where the defendant stopped a month after he left Jackson county, procure the appointment of another administrator, and go through with a third suit to the supreme court, and upon failure therein, on the same grounds repeat the process in Marion county. Such repetitions of the litigation in the forums chosen by the parties in interest would, in my judgment, be to the last degree vexatious; and a law permitting it, intolerable. The cases already cited from the United States supreme court, as I think, establish the principle that controls the decision of this case. But there are, also, numerous cases in the state courts to the same effect, and some of them determine the exact point. The precise point was presented and decided in favor of the conclusiveness of the judgment appointing an administrator, by the supreme court of California in *Irwin v. Scriber*, 18 Cal. 499, and that has been frequently affirmed in that state. (*Rogers v. 1; Warfield's Will*, 22 Cal. 51.) In *Lucas v.*

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Todd, 28 Cal. 185, 186, the court says: "The petition of the plaintiff for letters of administration *de bonis non* states all the jurisdictional facts and gave the court jurisdiction of the case." The rule with reference to other jurisdictional facts is definitely stated by Chief Justice Field, now a justice of the supreme court of the United States, in *Haynes v. Meeks*, 20 Cal. 313. After stating that a proceeding to sell land by an administrator is a distinct and independent proceeding in the nature of an action of which the filing of the petition is the commencement and the order of sale the judgment, citing *Sprigg's Estate*, 20 Cal. 121, he proceeds: "We must, then, examine the petition, to ascertain whether a case is presented by its averments, within the statute, upon which the court can act. And the petition must show upon its face two things: first, the insufficiency of the personal property to pay the debts and charges against the estate; and second, the necessity of the sale of the real property, or some portion thereof. Both must appear before the court can take jurisdiction of the proceeding. The truth of the averments—their sufficiency appearing—is matter which must be determined at the hearing of the petition, and the judgment of the court thereon, if rendered upon legal notice, cannot be questioned collaterally. It may be reviewed, and, if erroneous, corrected on appeal, but not otherwise." (20 Cal. 313.) If these jurisdictional facts once so determined on proper allegations and proofs, cannot be afterwards questioned collaterally, why should not a similar determination of the fact of inhabitancy, also, be conclusive? The same rule has, also, been established in many of the other states. (See *Fisher v. Bassett*, 9 Leigh, 119; *Andrews v. Avery*, 14 Gratt. 236; *Abbott v. Coburn*, 28 Vt. 667; *Burdette v. Sillsbee*, 15 Tex. 615; *Johnson v. Bearley*, 65 Mo. 264; *Bumsted v. Read*, 31 Barb. 664; *Bolton v. Brewster*, 32 Id. 393.) In Massachusetts a different view was taken in *Cutts v. Haskins*, 9 Mass. 547, but the character of the court does not appear, nor does it appear that there was any petition stating the jurisdictional facts. The court did pass upon the fact of residence, but it does not appear that the propriety of entering upon that inquiry was argued

or decided, or even questioned. The editor of the Massachusetts reports, in a note to the decision, calls attention to these points and questions the decision on the ground that when the facts are averred in the petition, the determination should be conclusive. This case was afterwards followed in the same state in 5 Pick. 20, and 9 Id. 259. But the great weight of authority, and, to my apprehension, the entire weight of reason, is the other way and in favor of the conclusiveness of the adjudication.

I should not have deemed it necessary to enter so fully into the discussion of the question, or to quote so largely from the authorities, had it not been for the case of *Thompson v. Whitman*, reported in 18 Wall. 460, which libellant's counsel has cited, and pressed in the argument and petition for rehearing with unusual earnestness and zeal, as well as manifest confidence and sincerity, as being directly in point and controlling in this case. Did I suppose the supreme court intended in that decision to cover this case, I certainly should yield to its superior authority; but I cannot, after a full consideration of the case, satisfy myself that the supreme court designed the decision to be so far-reaching in its effects. It must be admitted that there is general language used in the opinion, which, considered by itself, lends some countenance to the view maintained by counsel. But if he is correct in the rule assumed to be established by that authority, then there is no jurisdictional fact that can be conclusively determined by any court under any circumstances, and in all the cases to which I have referred, the question of jurisdiction is open to examination and repeated re-examination, collaterally, as often as the record is presented. There could be no conclusive determination of any jurisdictional fact, and, certainly none in any of the United States courts, depending upon citizenship of the parties, or upon the questions whether the case arises under the constitution and laws of the United States; and no conclusive determination of the jurisdictional facts alleged in an indictment for an offense, where the offense must be committed within the territorial jurisdiction of the court in which the indictment is found and tried. To give the decision the broad

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scope contended for, would be to overrule many cases deciding the principle upon which the conclusiveness of the adjudication rests in the same court, to which the court has not adverted in its decision. It cannot be supposed that it was the intention to overrule long established principles without even mentioning the cases in which they were elaborately discussed and established. Besides, the doctrines of those cases, and the cases themselves by name, have been expressly re-affirmed since the decision in *Thompson v. Whitman*, and the case of *Grignon's Lessees* was cited and approved, and the principles established by it reaffirmed as late as 101 U. S. 425, 426. The case of *Thompson v. Whitman* did not call for a statement of principle so broad in its terms as some of the language used, and the language of a judicial opinion must be considered with reference to the case decided. There must be a line somewhere between disputable and conclusive adjudications of jurisdictional facts. Some, certainly, have been adjudged disputable, and others indisputable. The court says in the case relied on: "It must be admitted that no decision has ever been made on the precise point" involved in that case. (18 Wall. 468.) Then the court does not consider the "precise point" involved and decided in that case to be the same with any point decided in *Grignon's Lessees*, and, therefore, it cannot be the same as the point stated in this language: "It is *coram judice* whenever a case is presented which brings this power into action; if the petitioner presents such a case in his petition, that on a demurrer the court would render a judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out a case, is the exercise of jurisdiction conferred by the filing a petition containing all the requisites, and in the manner required by law." That this and the further proposition that the adjudication upon such a petition is conclusive, are points of the decision, was the opinion of Mr. Justice Curtis, as is manifest from a consideration of the head notes to the case in his edition of the supreme court reports; for he professed to limit his head notes to the exact points

considered and actually decided by the court. Nor did the court consider it precisely the same as that in *Comstock v. Crawford*, 3 Wall. 403; or as that in the very late case of *Mohr v. Manierre*, 101 U. S. 425. Nor the same point as that decided in *Erwin v. Lowry*, 7 How. 180, that the jurisdictional fact of citizenship determined in the national courts cannot be collaterally inquired into—that the determination of that jurisdictional fact is conclusive. The court, therefore, does not intend to touch these cases nor the principles established by them. Where, then, is the line of division?

I apprehend it will be found, by examining the case of *Thompson v. Whitman*, and the line of cases cited and commented on in that case, and comparing them with the other line of decisions cited in this decision, which were carefully avoided by the court in its opinion. It will be found, on such examination, that, after a cause of action has arisen, after the cause of action is complete—something must always be done by the court, through its executive or ministerial officers, or somebody else on behalf of the court, to give the court jurisdiction either of the person, or, in a proceeding *in rem*, of the thing; such as serving a summons in a case at law or subpoena in chancery, upon the person within the state, giving a notice in some prescribed place, mode, or form, or seizing the thing. To get jurisdiction of the person, he must not only be served with process, but he must be served within the territorial jurisdiction of the court, as within the same state. In such case service within the state is the jurisdictional fact to be performed by and upon the authority of the court through its ministerial officers or other agencies of the court, appointed by law. In some states, as in New York, the service may be by private parties; but they act by the authority and on behalf of the court. In matters *in rem* there must be a seizure, and often some notice given to the parties in interest by the court in some prescribed mode. In such cases the seizure and notice are jurisdictional facts subsequent to and wholly independent of the cause of action and of all pre-existing jurisdictional facts not depending upon the action of the court, or its appointed agencies. In *Thompson*

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v. *Whitman*, the offense was complete when the vessel engaged in gathering oysters within the waters of New Jersey contrary to the statutes of that state. But the cause of action and forfeiture being complete, it was necessary to seize the vessel within the boundaries of the county over which the court had jurisdiction, to give jurisdiction to the court. The seizure within the county was the jurisdictional fact, and this was an act to be performed by the court, or on its behalf, through the agencies appointed by law. The jurisdictional fact was an act to be performed to get jurisdiction of the thing in all respects analogous to the service of summons within the state in order to acquire jurisdiction of the person, or the levy of an attachment upon property in an attachment suit in order to get jurisdiction of the property. And this is the class of cases cited as authorities and commented on by the court in *Thompson v. Whitman*, and those acts to be performed by or on behalf of the court in order to acquire jurisdiction of the person or thing, the class of jurisdictional facts that may be questioned collaterally under this authority and those cited, even though the court must have passed upon those facts. *Webster v. Reid*, 11 How. 456; *D'Arcy v. Ketchum*, Id. 172; *Harris v. Hardeman*, 14 Id. 334; *Knowles v. Gaslight Co.*, 19 Wall. 61; *Pennoyer v. Neff*, 95 U. S. 714; and *Thompson v. Whitman*, are fair examples of this class.

So also where it is only necessary to compare the record with the law, to see that the record shows a want of jurisdiction on its face, the record is not conclusive. In such cases there is no re-examination of issues of fact determined in the case. Such a case is *Elliott v. Piersol*, cited by the court.

Whenever the court undertakes to acquire jurisdiction over parties or things, through the acts of officers or other lawfully appointed agencies, performed by its authority or on its behalf, it must see that the proper acts have been duly performed, and whether they have been performed or not, under the decision referred to, may be inquired into collaterally.

But there is another class of cases where there is a com-

plete cause of action or proceeding existing, and the parties interested present all the facts—the necessary pre-existing jurisdictional facts as well as the others constituting the cause of action by alleging them in a petition, complaint, bill, or in the case of the state in an indictment or other proper pleading, and ask an adjudication upon them; and when the opposing party has had due notice by proper proceedings to acquire jurisdiction of the person, the court is required to act upon the allegations and proofs and determine the facts. The action of the court in determining the facts in such cases, the court having properly performed its part to get jurisdiction of the person or the thing, is the exercise of jurisdiction; and the determination and adjudication upon the allegations and proofs of the facts upon which the court is so required to act is conclusive upon a collateral attack, as I understand the authorities cited in this opinion, to sustain that proposition, even though some of the pre-existing facts alleged are, in a qualified sense, of a jurisdictional character.

If the line thus indicated in these two classes of decisions is not the true one between disputable and conclusive determinations and adjudications of jurisdictional facts—and there must be some line—then I confess I am not able to say where it should be drawn, and I shall leave it to the supreme court, when a proper occasion arises, to definitely and sharply locate it. If the line between inconclusive and conclusive adjudications of jurisdictional facts is to be further advanced in the direction of the latter, I shall leave it to that tribunal to make the advance. I certainly shall not be the one to take the first step. If, however, the supreme court should make the advance I shall obediently follow, but I fear with “unequal”—*non passibus æquis*—certainly, with reluctant steps. In my judgment the community ought to be entitled to rely with some confidence upon the solemn adjudications of the superior courts of the country; and I for one am unwilling to take the lead in judicial action that must, in the nature of things, largely exaggerate that very general lack of confidence in the sanctity, inviolability, and validity of the judicial records of even our superior courts, which, ous, now so widely prevails, largely depreciating

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the value of all titles to property resting upon judicial sales and proceedings, at least on this side of the continent.

Counsel cites section 766, clause 16 of the Oregon civil code, relating to disputable presumptions as controlling the case. The only observation I have to make upon that provision of the statute, is, that this is not a case of presumption, but of an actual adjudication of a fact upon proper allegations and proofs—a case of *res adjudicata*.

I regret that there is no appeal, as the point involved is one that ought to be authoritatively determined, and the question forever set at rest. But the statute expressly limits the recovery in such cases to five thousand dollars, and that sum is, therefore, the utmost amount that can be in controversy. (Or. Civ. Code, sec. 367.)

Upon the views expressed the petition for rehearing must be denied, and it is so ordered.

HARRIS LEWIS v. HERMAN SHAINWALD.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

NOVEMBER 25, 1881.

1. EQUITY RULE 90 neither enlarges nor limits the equitable jurisdiction of the courts of the United States, but merely regulates the practice in those cases wherein the court has jurisdiction under the constitution and laws of the United States in particulars not otherwise specially provided by rule.
2. CREDITORS' BILL.—Both the court of chancery in England and the court of chancery of the state of New York, prior to the passage of the revised statutes of New York, which provide for creditors' bills, had jurisdiction of a bill filed by a creditor after execution issued, and a return of *nulla bona*, to discover and apply to the satisfaction of the judgment or decree property subject to execution fraudulently conveyed or concealed for the purpose of evading the execution.
3. SAME—GROUND OF JURISDICTION.—The jurisdiction arises under the head of fraud and trust.
4. CREDITORS' BILL—NEW YORK REVISED STATUTES.—Whether the revised statutes of New York enlarged the jurisdiction of the court of chancery of that state in regard to creditors' bills not decided.
5. FISHING BILLS.—A bill which alleges with as reasonable certainty as the case admits the existence, and asks a discovery of, material facts, is not a "fishing bill." Fishing bills discussed.

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6. *NE EXCEAT*.—In a final decree, where the facts stated in the bill and established or admitted at the hearing justify it, a writ of *ne exceat republica* may be provided for, even though there be no prayer in the bill for the writ. The authorities indicate that the writ may also be issued, upon a proper application, after final judgment or decree.
7. *SAME*.—The writ of *ne exceat* is no more discharged by entry of judgment than an attachment. The very object of the writ is to detain the party within the jurisdiction of the court to secure the execution or the judgment or decree.
8. *THE DISTRICT COURT* has jurisdiction under section 716 of the revised statutes in a proper case to issue a writ of *ne exceat*. Section 717 relates to the several judges named as distinguished from the courts over which they preside.
9. *EQUITY RULE 21*.—The limitation of equity rule 21 only applies where the writ of *ne exceat* is asked for "pending the suit."

Before SAWYER, Circuit Judge.

APPEAL from the decree of the district court on a bill by a judgment creditor after execution upon his decree and a return of *nulla bona*, to discover and apply property of the defendant to the satisfaction of the decree against him; also providing for a writ of *ne exceat*. The facts necessary to illustrate the points decided are sufficiently stated in the opinion.

Delos Lake, for appellant and respondent in the court below.

J. L. Crittenden, for complainant in the bill.

SAWYER, Circuit Judge. This is a bill in equity, called by appellant's counsel, a creditor's bill, based upon a prior proceeding, in which a decree had been entered in the district court against the respondent, appellant here, for a large sum of money, and execution issued, upon which a return of *nulla bona* had been made.

It is claimed by the respondent, that, prior to the adoption of the revised statutes in the state of New York, no such thing as a creditor's bill, in the sense since used, was known; that a creditor's bill of the character here set forth was unknown to the court of chancery; and that, therefore, the case is not properly one of equity jurisdiction. Upon this proposition some decisions of the English courts are

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cited; and it appears, that some of the later decisions overrule some of the former ones upon certain points. In this connection equity rule 90 is cited as having a bearing upon the case, as prescribing that the English chancery practice shall be adopted in cases where our equity rules do not apply. That rule is as follows:

“In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery of England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.”

In my judgment, that rule does not in any way affect the question. The jurisdiction of this court is derived from the constitution and laws of the United States, and these rules are simply rules of practice, for regulating the mode of proceeding in the courts. They do not, and could not, properly, either limit or enlarge the jurisdiction of the court. The rule quoted simply regulates the practice in exercising the jurisdiction of the court in those respects wherein the rules adopted do not apply; but the practice of the high court of chancery is to be applied, not as controlling, but simply as furnishing just analogies to regulate the practice.

I am satisfied that creditors' bills, of some kinds, whether of the precise character of that now under consideration or not, were entertained both by the English chancery courts and in the courts of chancery in the several states, particularly in the courts of New York, prior to the adoption of the revised statutes of the latter state. The creditors' bills which were recognized previous to that time were, perhaps, in different form from that then adopted; but there undoubtedly were instances of bills maintained by creditors to subject the assets of debtors to the payment of their debts. The discussions upon the subject related mainly to the character of the assets and the circumstances of the particular case.

In the case of *Hadden v. Spader*, 20 Johns. 554, before

the court of errors, and in which the decision of Chancellor Kent sustaining a creditor's bill is affirmed, I think the rule is established, that certain assets can be reached and appropriated by a bill filed by a creditor; and several prior cases recognized the same principle.

In the subsequent case of *Donovan v. Finn*, Hopk. 59, there was suggested some limitation. That case, however, did not overrule, or purport to overrule, as it could not, the decision of the court of errors in the case last referred to. Indeed, the two decisions as to the real point involved and decided, do not conflict. The latter case was one into which the element of fraud, either actual or constructive, did not enter. It was simply a case where a legacy had been left to a debtor, which was in the hands of an executor, and a creditor's bill was filed to reach that legacy. There was no collusion or fraud, or voluntary conveyance, or other subject-matter of equity jurisdiction in the case. The debt was treated as an honest debt; and the chancellor held that it could not properly be reached by a creditor's bill. He recognizes, however, the propriety of filing such bills in cases of fraud. Frauds and trusts are in themselves subjects of equity jurisdiction. Indeed, matters of fraud and trusts are among the most extensive heads of equity jurisdiction. Wherever there is fraud in a case which cannot be fully remedied at law, equity intervenes and uncovers the fraud; and the fact that a creditor is injured by a fraudulent concealment or withholding of property brings him into such relations to the fraudulent transaction, that he may, on that ground, invoke the equitable jurisdiction of a court of equity; have the fraud uncovered, and take hold of the funds or the property fraudulently concealed and withheld from him. He comes within the jurisdiction of the court, not merely because he is a creditor; not because his bill is a creditor's bill; but because he presents a case in which he sets forth matters of fraud or trust; and equity entertains his bill simply because he stands in such a relation to the fraudulent transaction that he is entitled to have the fraud uncovered, or a trust declared and enforced.

This principle is recognized in the case last referred to. I read from the decision as reported in 14 American Decisions, page 533. After stating that "it is apparent that this case does not belong to any general head of equitable jurisdiction, such as frauds, trusts, accidents, mistakes, accounts, or the specific performance of contracts;" that "there is neither fraud, nor trust, nor accident, nor any other ingredient of equitable jurisdiction," the chancellor proceeds to say:

"The English cases cited proceeded, as I conceive, not upon the ground of subjecting the credits of the judgment debtor to the payment of his debts, but upon some ground of equitable jurisdiction, as fraud or trust, existing in each case. * * * The case of *Bayard v. Hoffman*, 4 Johns. Ch. 450, was not the case of a judgment creditor; but the object of the suit was to annul an assignment in trust, made by a debtor without consideration. The assignor was insolvent when the assignment was made; that fact not being then known, no actual fraud was intended; but the assignment had all the operation of fraud against the creditors of the insolvent debtor; and for these reasons the cause was of equitable jurisdiction. * * *

"The case of *Hadden v. Spader*, 5 Johns. Ch. 280, and 20 Id. 554, was also a case of an assignment by an insolvent debtor of property upon various trusts. It was clearly a case of trust; the assignment was charged to have been made by fraud, and though the answers denied that fraud was intended, the facts exhibited a case of fraud. The effect of the assignment, if it had prevailed, would have been to withdraw and screen from execution the property of the debtor; the assignment was held to be void, and the judgment creditor had relief. These are the principal cases which have been adjudged in this court, and in all of them some acknowledged ground of equitable jurisdiction existed. In general, they were suits to set aside conveyances, which prevented the seizure of property by the sheriff, and the conveyances have been considered frauds, either actual or constructive. * * *

"In giving relief in such cases, this court does not proceed upon the idea of giving execution against a species of prop-

erty which is exempt from execution at law; but it acts upon some of the most ancient grounds of its jurisdiction, which enable it to give relief in cases of fraud and trust, either to a judgment creditor or to any other person whose just rights may be destroyed or impeded by such a cause. * * *

"I fully concur with Judge Platt in his opinion given in the case of *Hadden v. Spader*, and in his view of the powers and jurisdiction of this court, in respect to the rights and remedies of creditors. The case now to be decided has not one feature of equitable jurisdiction. In it there is neither fraud, nor trust, nor conveyance of property, nor any interruption of the effect of an execution, or the due course of justice at law. * * *

"But when equity has jurisdiction, by reason of some disposition of the debtor's property, made in fraud of the creditor, and when, in such a case, the sheriff of the county in which the property is situated returns upon the execution that no property is found, the return is important evidence to show that the fraudulent disposition has had effect by preventing the service of the execution. By the existing law, the property of a debtor consisting of things in action held by him without fraud, is not subject to the effect of any execution issued against his property; and while a court of law does not reach these things by its execution, a court of equity does not reach them by its execution, for the purpose of satisfying either judgments at law or decrees in equity.

"All conveyances made to defraud creditors are void, both in law and equity. When a fraud appears to a court of law, the conveyance is there adjudged void. When such a fraud is presented to this court, it is of equitable jurisdiction; and the property of the debtor, fraudulently transferred, is subject to the satisfaction of his debts, in favor of a creditor complaining of the fraud. Does an insolvent debtor transfer his property to another person, in trust, for himself, or in such a manner as to defeat the effect of a judgment and an execution? This is the frequent case. It is a case of both fraud and trust, and it is of equitable jurisdiction. It was the case of *McDermut v. Strong*, and of *Hadden v. Spader*. In all such cases this court vacates the fraud, sets

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aside the conveyance in trust, and, acting both upon the debtor and his trustee, it does complete justice to the creditor. Thus, the jurisdiction of this court reaches, and reaches effectually, those cases of fraudulent conveyances and assignments in trust, which form the great and most vexatious impediment in the course of justice between creditor and debtor. Bills for discovery, where no relief is sought, also afford important aid to creditors against their debtors. But this court has no power to cause stocks, credits, and rights of action, held by a debtor, without fraud, to be sold or converted into money, to be transferred to the creditor, or to be applied to the payment of debts."

Now this is the distinction between this case of *Donovan v. Finn* and the other cases referred to. In the latter case it is the element of fraud which brings them within the jurisdiction; and a creditor, as well as any other party who is injured by the fraud, is able to maintain a bill to have the fraudulent act vacated, and to be relieved from the consequences of it.

In a note appended to the report of the case last cited it is said: "It is doubtful, where there has been no legislation upon the subject, whether, in the absence of fraud or any other well-known ground for supporting the exercise of its jurisdiction, equity will assist a creditor to reach those assets of his debtor which under no circumstances could have been subject to execution at law."

A large number of cases are then cited; and it is then added: "What stocks, choses in action, franchises, and other property which was not subject to execution at common law, can now, in the absence of any statute on the subject, be reached by a creditor's bill, must still be regarded as unsettled. By such bills, creditors have in several instances succeeded in obtaining satisfaction out of the interest of an heir or distributee while still in the hands of an executor or administrator."

Then follows another citation of numerous authorities, which I have not examined, as I did not consider it necessary to this decision.

In this case the charge of fraud is set up in the bill, in

which it is alleged that the respondent has made fraudulent transfers of his property; has converted portions of it into money, and secreted the proceeds; that other property, to the amount of many thousands of dollars, has been concealed from the complainant, in order to prevent him from securing it by execution issued under the decree of the court; and that he is about to carry all his money and other property beyond the jurisdiction of the court; the notorious and declared purpose of all these acts being to defraud the complainant, and render it impossible for him to realize any portion of the amount to which he is entitled under the decree.

By his demurrer the respondent admits these averments of the bill, and takes his stand upon the point, that the court is without jurisdiction to entertain or determine a cause of the character of that which is set forth in the bill.

The case of *Mountford v. Taylor*, 6 Ves. jun. 787, which has been cited here, was a case similar to the one at bar. The bill stated that the judgments were obtained at a time when "the defendant was, ever since has been, and now is, seized for his own use of freehold estates for his life, or some greater estate; that the plaintiffs sued out writs of *elegit* upon these judgments; but neither of them has been able to discover where the estates of the defendant are situate," and does not know what they are, or where they are. But the complainant charges that in or about the year 1795, some years before, the defendant, upon taking a seat in the house of commons, took the oath as to his having the requisite amount of property to qualify him to act as a member of that body, and that "he also delivered to the clerk of the house of commons, or some other officer of the house, a schedule, containing the particulars of the estate, whereby he made out his qualifications; and the plaintiffs are unable to obtain the said schedule." They also state, that if, as he pretends, he has since conveyed the estates of which his qualification was composed, "such conveyance was without consideration, and in trust for himself;" and the bill prayed for a discovery.

The defendant demurred as to the main statements recited

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in the bill; Mr. Mansfield and Mr. Pemberton claiming, in his behalf, that the object of the bill was idle curiosity; that no creditor had a right to make these inquiries.

During the argument, the lord chancellor, throwing out suggestions, says:

"It seems admitted that they have a right to come here for a discovery where the property is, in order to make their judgments available. That, certainly, will not affect real property had before the judgment was obtained, if no longer under such circumstances that the creditor can follow it; but it does not follow that he cannot, merely because it does not remain in the ownership of the debtor; for there may be many cases in which he might. There is a material charge in this bill: that if there was any conveyance, it was without consideration."

There is no positive averment in the bill that there was a conveyance made by the defendant; but it alleges that, if there was a conveyance, it was made without consideration; and that, the lord chancellor says, is a material charge. He then proceeds to say: "First, in the common case will a bill for a discovery lie, with all this particularity, to know every estate he has sold and disposed of for three years? If so, he may go back forty years." He then remarks: "There is difficulty upon the objection, that this would extend to an estate parted with forty years ago, without consideration; and I am not quite clear that such a bill must not allege that at a given time the defendant was seized of given lands (not simply suggesting, as a fishing bill, that at some time or other he had some land); and that he conveyed these lands away fraudulently, to put them out of the reach of his creditor."

These remarks quoted were made by Lord Eldon during the argument; and he took the case under consideration, and on the twentieth of March he overruled the demurrer, saying:

"The bill is met by a defence, admitting that it is a proper bill; and the answer does not negative all that is material to be answered. With respect to the nature of the qualification, if he had said, the property he gave into the

house of commons was not liable to execution, the court ought to be content with that, without requiring from him more particularity. But the bill charges that the defendant delivered in a schedule of the particulars of the estates, whereby he made out his qualification, and that he has conveyed them without consideration, as evidence, that he has lands liable to execution; as they may be unquestionably. Upon that I think he must answer."

In this case of *Mountford v. Taylor*, then, Lord Chancellor Eldon held that the conveyance of his estate by the defendant without consideration was fraud; and that a creditor, as well as anybody else, might avail himself of it. In their bill the complainants in the case declare that they do not know the character of defendant's estates, nor where they are situated; but that he had, upon taking his seat as a member of the house of commons, delivered to the clerk or other officer a verified schedule in which his estate was set forth, which schedule the plaintiffs are unable to obtain. All of the allegations of the bill with respect to the defendant's property are argumentative. The complainants further alleged, however, that the defendant had conveyed his estate, without consideration, and in trust for himself, and they were unable to find it.

These allegations of this creditor's bill are as indefinite as could possibly be; yet the lord chancellor sustains the bill; and his decision in that case, as well as the decisions in the cases of *Spader v. Hadden* and *Donovan v. Finn*, referred to, and numerous other cases cited in those decisions, sustain the ground that where the case presented is one of equitable jurisdiction, a creditor, as well as anybody else, is entitled to the aid of and redress from the court.

In the bill in the case at bar, it is alleged that the respondent has converted a certain portion of his property, to the amount of twenty thousand dollars, into cash, which he has concealed, with the intention of carrying it out of the United States; that he has other property, to the amount of ninety thousand dollars, which he has so arranged and concealed that he will be enabled to take it out of the United States; and that his express and declared purpose in so

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concealing and arranging his property, and in carrying out his intention of taking it away with him, is to fraudulently evade this complainant's execution.

This bill has been designated by the appellant's counsel a "fishing bill." What is meant by this term is indicated by Lord Eldon in the cited case of *Mountford v. Tylor*, in the previously quoted language—"not simply suggesting as a fishing bill, that at some time or other he had some land," which was a remark thrown out during the argument. Such a bill is one in which there are no allegations of a definite or positive character as to the defendant's having at any time owned property which could have been subject to execution upon the plaintiff's claim; or one asking for a discovery as to matters which cannot in any way affect the rights of the parties. It is evident, from the way he uses the expression, that it is to cases of that class that Lord Eldon refers. In that case it is alleged in the bill that at a certain time, the defendant did have some property, which property he had since conveyed, if conveyed at all, without consideration, in trust for himself; and, although the complaints are unable to state where the property of the defendant is, the lord chancellor does not consider the bill a fishing bill, but overrules the demurrer, and compels the defendant to answer with reference to that particular property.

The nature of a fishing bill is defined by Chancellor Kent (then a judge of the court of errors of New York) in the case of *Newkerk v. Willett* (2 N. Y. Cases in Error, 296), in which he says:

"The bill does not state sufficient equity to entitle the appellants to a discovery. It states generally, that the respondent had made a demand upon one of the appellants, as executrix of Peter Schuyler, deceased, and that, as he did not produce any voucher, she had refused to pay him. It states, further, that he proposed an arbitration, which she refused, and that finally he had brought a suit against the appellants, in the supreme court. The bill states further that the appellants know nothing of the demand of their own knowledge, but that they believe it unjust, because the

respondent took no measures to liquidate and settle it in the life-time of Peter Schuyler, and does not now produce any vouchers, and has been inconsistent in what he has from time to time said as to the nature and extent of his demand.

“This is the substance of the bill: it amounts to this: the respondent has sued us at law, and we do not know for what, and therefore we ask for a discovery beforehand, although we have reason to conclude he has sued us upon some groundless pretence. Such a bill shows no equity, no right to a discovery. It sets forth no matter material to a defence at law, and which can be proven, unless by the confession of the opposite party. It is, to use Lord Chancellor Hardwicke’s expression, a mere fishing bill, seeking generally a discovery of the grounds of the respondent’s demands, without stating any right to entitle them to it. Such a bill may be exhibited by any executor or administrator, and indeed by any defendant, who is not already in possession of the plaintiff’s proofs. But the court of chancery has wisely refused to sustain bills for discovery in such latitude, and unless the party calling for a discovery will state some matter of fact material to his defence, or which he wishes to substantiate by the confession of the defendant, the court will not enforce a discovery.”

It is with this same view, as I understand it, that Lord Eldon, in the case before cited, alludes to a discovery of matters running back forty years—matters which cannot, by any possibility, affect the rights of the parties; and a bill asking for such a discovery is a fishing bill. But as to a bill for a discovery of matters of such character and date that they can be immediately connected with the complainant’s cause, and which matters he could not discover or ascertain without the aid of the court, the bill also alleging that, since the accruing of complainant’s right, the respondent has conveyed away his estates, without consideration, and in trust for himself, such a bill is not a fishing bill, because it sets forth matters material to the cause. A conveyance of the character alleged would be a fraud in law, and the complainant is entitled to a discovery.

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In the present case, the charge of fraud is direct. In his bill, after setting forth that he has recovered judgment against the respondent for a large sum of money; that execution has issued, and a return of *nulla bona* has been made thereon, the complainant avers that a short time before the rendition of judgment, and during the pendency of the action, the respondent disposed of, and converted into cash, real property to the amount of twenty thousand dollars; that since the rendition of the judgment he has secretly transferred a large part of his property, and has secreted the remainder; that he has property to the value of ninety thousand dollars, which the complainant has been unable to reach by execution; that he intends and is about to convert into cash all his property, and to depart, taking it with him, beyond the jurisdiction of the court; and that all these acts and steps have been committed, taken, and proposed with the declared purpose of so "fixing" his property that it cannot be seized to satisfy the judgment, and to defraud the complainant of the money due under it.

Those matters are material. Here is set forth the fraud which the complainant is seeking to unveil; and if the alleged state of facts exists, he is entitled to apply the funds of the respondent, wherever they are, to the satisfaction of the judgment. The fact that the complainant is unable to describe and locate the property and funds of the respondent ought not to make it impossible to bring his cause within the jurisdiction of a court of equity, for under existing laws it is possible for a party to hold property in such a manner that only by a discovery can another be enabled to locate or describe it. If in a case of this kind a complainant were not entitled to a discovery, it would be possible for a debtor to conceal his property, or to convert it into money and put it in his pocket, and so evade a judgment. The arm of the court of equity would certainly be very short if it could not reach the respondent in such a case, although the complainant would be unable to describe the property or identify the money. In the nature of things it is impossible to identify the money. But if this respondent has in his possession the twenty thousand dollars which

he is alleged to have received for that portion of his property which he has sold, and other property as well, he is bound to discover it, and yield it up, that it may be applied to the satisfaction of the judgment. If, as is averred in the bill, the respondent in this case has converted a portion of his property into money, and intends to carry that money and his other property beyond the jurisdiction of the court, then this bill is sufficient.

Another point is made in this case, with reference to the issuing of a writ of *ne exeat republica*. Respondent's counsel contends that the court has erred in directing in its decree that the writ should issue; that such a writ is only a provisional remedy, the right to which expires upon the determination of the suit and the entry of judgment.

The very object of this provisional remedy is to secure the presence of the party in order that the judgment may be executed—in order that he may not be enabled to evade it. This writ is not discharged any more than an attachment is discharged upon the entry of judgment. A writ of attachment is discharged upon the satisfaction of the judgment, or upon giving security; and the writ of *ne exeat* should continue in force until the judgment is satisfied, or until the writ is dissolved, or proper security given. (*Mitchel v. Bunch*, 2 Paige, 606; S. C., 22 Am. Dec. 669; *McNamara v. Dwyer*, 32 Am. Dec. 631.)

It is claimed by the respondent's counsel, that that portion of the decree which directs that this writ shall issue is arbitrary; that no limit is placed upon the length of time it shall continue in force. I presume the court will have power to control that matter. The decree may possibly be too broad in that regard; and, if counsel desire it, it can be so modified as to obviate any objection upon that ground.

That this writ may be issued even after judgment is established, see *Moore v. Hudson*, 6 Mad. 218; *Elliott v. Sinclair*, Jacobs, 545; *Collinson v. Wattleworth*, 18 Ves. 353; *Russell v. Ashby*, 5 Ves. 96.

According to Daniel's Chancery Practice, and many authorities, a prayer in the bill for a *ne exeat* is not necessary. (3 Dan. Ch. Pr. 1936; *Durham v. Jackson*, 1 Paige, 629;

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Gilbert v. Colt, 14 Am. Dec. 561, note.) It is sufficient if the facts alleged in the bill and established, show a proper case for the writ, and it may be granted in the decree under the prayer for general relief. Or the facts may be shown, and the writ applied for upon a petition presented in the case either before or after judgment or decree. The limitation of equity rule 21 only applies where the writ is asked for "pending the suit."

"And it is further ordered, adjudged, and decreed, that the writ of *ne exeat republica* of the United States of America issue out of and under the seal of this court, to restrain the said Harris Lewis from departing out of the jurisdiction of this court." That is the form of that portion of the decree relating to this matter. I think it would have been better, and it certainly would have avoided criticism, if to this had been added—"until the satisfaction of the decree, or the further order of the court."

Respondent's counsel cites a case in 2 Wash., to show that a district court has no authority to issue a writ of *ne exeat*. In that case, however, the writ was issued by the judge, and not by the court. That case arose at a time when the jurisdiction of the district court was limited, and did not cover a case of the character of that now under consideration at all. There is a distinction between the judge and the court, a distinction recognized in the revised statutes. Section 717 reads:

"Writs of *ne exeat* may be granted by any justice of the supreme court, in cases where they might be granted by the supreme court; and by any circuit justice or circuit judge, in cases where they might be granted by the circuit court of which he is a judge. But no writ of *ne exeat* shall be granted unless * * * satisfactory proof is made to the court or judge granting the same, that the defendant designs quickly to depart from the United States."

By the revised statutes, section 716, it is provided that "the supreme court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their

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respective jurisdictions, and agreeable to the usages and principles of law."

The writ of *ne exeat* is one of the writs necessary to the exercise of the present jurisdiction of the district court. The jurisdiction of that court has been enlarged since the adoption of these statutes, and since the date of the decision last referred to. In cases of the character of the one at bar, it has now concurrent jurisdiction with the circuit court. The authority of the district court to issue this writ is therefore unquestionable.

The decree of the district court must be affirmed, except that, if the appellant so elects, it may be modified in the respect indicated.

JEROME F. MANNING v. SAN JACINTO TIN COMPANY.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JANUARY 3, 1882.

1. MEXICAN GRANT—MINING CLAIM.—Where a party enters upon land claimed under a Mexican grant, after a confirmation under the act of congress of 1851, and pending the proceedings for location takes up a mining claim in pursuance of the provisions of the act of congress of 1866, and the patent subsequently issued upon the Mexican grant so confirmed, includes the mine so located, the patent is conclusive as between the parties.
2. SAME.—A party so locating a mine cannot, upon a bill in equity, question the correctness of the location of the grant, on the ground that it was fraudulently located by the officers of the government, with the knowledge of the patentee, upon lands not covered by the grant, and for the fraudulent purpose of securing the mines.
3. SAME.—The United States, if anybody, is the party injured by the fraud, and the only party that can vacate such patent for fraud in the location upon a bill filed for the purpose.
4. THE MERE LOCATOR OF A MINING CLAIM upon land claimed under a confirmed Mexican grant, who has not applied for a patent, or tendered the purchase money, has no title from, or privity with, the government, and no *status* that enables him to attack a patent issued upon such confirmed Mexican grant upon the ground of fraud perpetrated by the officers of the government in the location.
5. SAME—EQUITY.—The court could not do equity in such a case upon a bill filed by the locator and claimant of the mine.
6. STATUTE OF LIMITATIONS—FRAUD.—Under the statute of limitations of California, an action for relief on the ground of fraud must be brought within three years after the cause of action accrues.

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Statement of Facts.

7. IGNORANCE OF THE FRAUD will not excuse *laches* in the complainant, when the fundamental facts upon which the frauds charged rest are matters of public record, and such as ought to afford a clue, which, if followed with reasonable diligence, must have led to a discovery of the frauds.

Before SAWYER, Circuit Judge.

DEMURREE to the bill. Briefly stated, it is substantially alleged, that between July 26, 1866, and October 27, 1867, the grantors of complainant, without stating who they are, or the particulars of their acts, in pursuance of the act of congress of July 26, 1866, and the customs of miners of the district, located and claimed a large number of tin mines, some four hundred claims, as I make the number, in the county of San Bernardino, and worked them in such manner as to secure the several claims, and entitle them to patents under the acts of congress—having expended on each claim over one thousand dollars, and in the aggregate one hundred and seventy-five thousand dollars, prior to said October 27, 1867—the lands on which said mines were located being at the time unsurveyed public lands of the United States; that in 1846, Governor Pio Pico granted to Maria del Rosario Estudillo de Aguirre eleven leagues of land, in what is now San Deigo county, under the name of “Rancho Sobrante de San Jacinto Viejo y Nievo,” said land being within larger exterior boundaries, and the surplus of other grants, and the survey to be commenced from the boundaries of two other named ranchos, situate in a tract of land theretofore known as “San Jacinto;” that in pursuance of the conditions of said grant, said Maria entered upon said land, erected a house, and thenceforth to the present time lived thereon, and occupied and enjoyed said rancho; that on said October 27, 1867, the president of the United States issued a patent for said grant to said Maria, granting to her the said land granted by said Pio Pico by the name aforesaid, being the surplus remaining within the boundaries of the tract called “San Jacinto,” as shown in the expediente of Miguel Pedrorena, filed in the application for confirmation before the board of land commissioners over the lands granted to Estudillo and Pedro-

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rena, said patent for a more particular description of the lands referring to a survey and plat annexed to said patent purporting to have been made by the United States surveyor-general of California, and approved by him and by the commissioner of the general land office, and the secretary of the interior; that he is informed and believes, and so charges the fact to be, that said land described in said plat and patent, is not the land granted by Pio Pico, and settled upon and occupied by said Maria, nor any part of the same, nor within the larger exterior boundaries from which said sobrante was to be taken; but that said land described in said plat and patent is situate in the county of San Bernardino, more than six miles at the nearest point, and more than twenty miles from the farthest point away from said land; that said land was never surveyed in the field, but said plat was arbitrarily made up in the surveyor general's office without any data other than surveys of other ranchos, and without any regard to the decree of the court or said espediente, for the fraudulent purpose of surreptitiously embracing and securing said large number of tin mines located and held as aforesaid. The bill then alleges a combination and fraudulent conspiracy between no less than three well-known deputies in the surveyor-general's office, the United States surveyor-general himself, the commissioner of the general land office at Washington, and a participation therein by a large number of well-known and prominent citizens and officers, some residing at Washington and in the eastern states, of national reputation, for the purpose of fraudulently locating the said grant upon lands beyond the exterior limits of the original grant, in order to secure said tin mines; that notice was published, but not for the full time, and thereupon parties in interest other than complainant's grantor filed protests on various grounds, and among them on the ground that the location is not within the grant, and was made without regard to the decree, juridical possession, espediente, or the actual possession and occupation by the said Maria; that these objections were overruled by a deputy surveyor-general, and the plat reported without the objections to the commissioner of

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the general land office; that the commissioner of the general land office, upon a promise or conveyance of an interest in the grant, if he would approve the plat and conceal the facts from the secretary of the interior and the president, did so approve the plat, conceal the facts, and recommend a patent, which was thereupon issued; that the defendant corporation was afterwards organized and the land conveyed to it in consideration of the stock issued to the parties in interest—the said several conspirators—and other parties, with full knowledge of the frauds alleged; that the said land so patented includes the said several tin mines so located and worked by complainant's grantors; that complainant "never knew or heard of the various actings and doings hereinbefore" * * * and in "this bill set forth, or any of them, until within two years last past;" that by reason of the patent to said Maria, complainant's grantor was prevented from applying, and did not apply for a patent to said several tin mines, he believing the said patent to be paramount, and not knowing the said alleged fraudulent acts set out; that complainant has not applied for a patent for similar reasons, he supposing the title in defendant under said patent to be paramount till within three years last past, and not knowing the contrary till within two years last past.

The bill further alleges all these fraudulent acts set out to have been performed with the knowledge of defendant, and of the said Maria, the grantee and patentee; but alleges no active participation on the part of said Maria, the patentee. Complainant asks that said patent and subsequent conveyances to defendant, be decreed to be void, and the defendant required to convey said several tin mines to complainant.

M. G. Cobb, for complainant.

B. S. Brooks, for defendant.

SAWYER, Circuit Judge. The patent described in the bill was issued upon a Mexican grant made in 1846, after confirmation by the board of land commissioners, affirmed by the United

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States courts on appeal in pursuance of the act of congress of March 3, 1851, "to settle private land claims in the state of California." (9 Stat. 631.) The effect of a patent issued upon such confirmation of a Mexican grant of the kind, has been settled by the supreme court of the United States, as well as by numerous decisions of the supreme court of California. In *Beard v. Federy*, 3 Wall. 491, the supreme court of the United States states the effect of such a patent in the following language: "In the first place, the patent is a deed of the United States. As a deed, its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the board of land commissioners. In the second place, the patent is a record of the action of the government upon the title of the claimant, *as it existed upon the acquisition of the country*. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former government. The treaty of cession also stipulated for such protection. The obligation to which the United States thus succeeded, was of course political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the act of March 3, 1851, they have declared the *manner*, and the *terms* on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions of the tribunal, first, to the district, and then to the supreme court; and designated officers to survey and measure off the land, when the validity of the claims is finally determined. When informed by the action of its tribunals and officers, that a claim asserted is valid, and entitled to recognition, the government acts and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government

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upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, *and is correctly located now, so as to embrace the premises as they are surveyed and described.* As against the government *this record*, so long as it remains unvacated, *is conclusive.* And it is equally *conclusive against parties claiming under the government by title subsequent.* It is in this effect of the patent as a record of the government that its security and protection chiefly lie: If parties asserting interests in lands *acquired since the acquisition of the country, could deny and controvert this record*, and compel the patentee in every suit for his land to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, *the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor.* The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rest, would be open to contestation. *The intruder resting solely upon his possession, might insist that the original claim was invalid, or was not properly located, and therefore he could not be disturbed by the patentee.* No construction which will lead to such results can be given to the fifteenth section. The term 'third persons,' as there used, *does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property."*

In *Teschemaker v. Thompson*, 18 Cal. 26, the supreme court of California, by Chief Justice Field, says: "This instrument (the patent) is not only the deed of the United States, but it is a solemn record of the government, of its action and judgment with respect to the title of the claimant existing at the date of the cession. By it the sovereign

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power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid and entitled to recognition and confirmation by the law of nations, and the stipulations of the treaty; and that the grant was located, or might have been located by the former government, *and is correctly located by the new government so as to embrace the premises as they are surveyed and described. Whilst this declaration remains of record, the government itself cannot question its verity, nor can parties claiming through the government by TITLE SUBSEQUENT.*" But "as the record of the government of the existence and validity of the grant, it establishes the title of the patentee from the date of the grant." In this case that would be from 1846.

And again: "The 'third parties' against whose interest the action of the government and patent are not conclusive, under the fifteenth section of the act of March 3, 1851—are those whose title accrued before the duty of the government and its rights under the treaty attached." This view was established in *Leese v. Clark*, 20 Cal. 412, 420, 423, and repeated in numerous other cases. (See *Bissell v. Henshaw*, and cases cited; 1 Saw. 565, and 18 Wall. 268.)

In *Carpentier v. Montgomery*, 13 Wall. 495, the court says, that the provision of the fifteenth section of the act of congress cited, "was intended to save the rights of third persons not parties to the proceeding who might have Spanish or Mexican claims independent of, or superior to, that presented by the claimant, or the equitable rights of other parties having rightful claims under the title confirmed." The complainant has no pretense of a claim under any Spanish or Mexican grant to any part of the premises covered by the patent. His rights, whatever they may be, are alleged to have accrued under the act of congress of 1866, and, consequently, subsequently to that date. The patent is founded on a Mexican grant made in 1846, and its validity is not even questioned. The claim must have been presented for confirmation on or before March 3, 1853, as that was the latest date on which it could have been presented under the act of congress (9 Stat. 633, sec. 13). It was, in fact, confirmed, and the decree of confirmation affirmed by the United

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States supreme court as early as the December term, 1863. (*United States v. D'Aguirre*, 1 Wall. 311.) The title was therefore settled, and it only remained to locate the grant, long before the rights of complainant had their inception. The proceeding for locating the grant was, under the decree of confirmation, pending between the United States and the claimant under the grant when the act of congress of 1866 was passed, and the mining claims were located, and the genuineness of the grant and its location are *res adjudicata* under the authorities cited, between the United States and the patentee; and the adjudication is, that the grant is "CORRECTLY LOCATED," as well as valid (cases before cited). The complainant deriving whatever rights he has from the United States, one of the parties, subsequent to the institution of the proceedings for confirmation, is concluded by the determination. Besides the grant must have been located either under the act of 1860, or the act of 1864. In either case the proceedings for location were in the nature of proceedings *in rem*. The complainant or his grantor could, under the statute, and should, have objected to the survey and location, and upon a decision against him have appealed to the commissioner of the general land office, and, if the decision was not satisfactory, to the secretary of the interior. He alleges that he did not file objections, but that parties other than himself or his grantors did, and alleged the very grounds now relied upon against the location, which were overruled.

Nor does it appear that even they appealed. The complainant, then, has no standing to impeach the record on the ground of having a prior Spanish grant. His rights are subsequent and subject to the grant as located; he is equally without standing on the other ground; he alleges no "equitable rights," or "rightful claim under the title confirmed;" he does not claim any interest under the Mexican grant confirmed and patented; or that the patent was issued to the wrong party; he claims that the grant, though valid, and confirmed to the rightful party, was improperly located. He does not, therefore, bring himself within the classes of trusts protected in *Estrada v. Murphy*, 19 Cal.

272, and *Wilson v. Castro*, 31 Id. 420, or in any other case cited.

But complainant has no standing to impeach the transaction on another ground. He has no apparent title from the United States. His right, whatever it may be, is, at best, only inchoate. It is a mere privilege; a first right to purchase, or pre-emption right under the acts of congress, of which he may avail himself or not, as he chooses, if he should succeed in vacating the patent. He is not bound to purchase of the government, and may abandon his claim at any moment. Neither he nor his grantor has ever tendered the purchase money to the United States or to defendant, or applied for a patent, and it so appears in the bill, and *non constat* that he ever will do either. He is in no better position as regards title in his relation to the government than the parties in *Hutton v. Frisbie*, 37 Cal. 481, and *Frisbie v. Whitney*, 9 Wal. 187. Complainant as yet has no privity with the government in the lands in dispute, and no ground for equitable relief on that score. (*Doll v. Meader*, 16 Cal. 295.) The United States, if anybody, is the party injured; and the right to vacate the patent for fraud, if any such right exists, is in the United States; and the United States should file the bill to vacate the patent. (*Moore v. Robbins*, 96 U. S. 533.) Justice can only be done, if at all, upon a bill filed by the United States—the party to the transaction, and the party injured. It is not claimed that the grant confirmed and patented is not valid and properly confirmed; but it is said it is improperly located. The patentee, then, is entitled to eleven leagues of land somewhere. Even upon a bill filed by the government, if the location should be vacated on the ground of frauds practiced by the officers in locating it, with or without the knowledge of the patentee, it is, at least, doubtful, if it could be relocated in the proper place. The ordinary courts have no jurisdiction in the location of grants, except in the mode prescribed by the special act of congress on the subject. But suppose the complainant should succeed in charging the defendant as a trustee, on account of fraudulent acts occurring before he had any interest in the matter, and obtain a decree for con-

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veyance of the whole, or a part of the land, there could be no relocation on other lands, for the patent is not vacated, and the proceedings between the patentee and the United States are conclusive. The grantee has got the full amount of land called for in her grant, and she, or her grantee, has been compelled by the court to convey it to a party who has, and claims, no interest in the grant, legal or equitable. If the complainant can thus obtain a conveyance of a large part of the grant, under similar circumstances, the whole can be taken, and the grantee, under the Mexican grant, would be left without any land, although adjudged to be entitled to eleven leagues. The court cannot do equity on a bill filed by the complainant alone, even if it can in any case. The complainant does not even offer to pay either the patentee or the government for the land. He proposes to take it under a decree of the court, so far as any offer is concerned, without payment of even the small sum required by the statute.

The United States is no party to the bill, and would not be affected by the decree. Clearly the United States is the proper party, and the only proper party, to a suit upon the facts set out in this bill. No decree could be rendered against the defendant in a suit by any other party which could do it justice, or protect and preserve its rights under the Mexican grant, confirmed and patented. The fraud charged, if it exists, certainly deserves the severest punishment, but the law does not punish it in that way. In my judgment, the case does not fall within the principle announced in *Johnson v. Towsley*, 13 Wall. 72, and followed in subsequent cases of a like character. (*United States v. Flint*, 4 Sawyer, 74.) The complainant, in my opinion, is not in a position to maintain this bill. The genuineness of the grant and its "correct location" were the very questions in issue and determined in the proceedings for confirmation and segregation under the acts of congress, and these questions can not be re-examined in other tribunals even upon a bill filed by the United States, as was held in *United States v. Flint*; *United States v. Throckmorton*; and *United States v. Carpentier*, 4 Saw. 42, affirmed in 98 U. S.

61. In *United States v. Flint*, I had occasion to observe that "it is a startling proposition to those who hold patents to lands issued upon confirmed Spanish or Mexican grants, that after twenty-five years of compulsory litigation, intended, in the language of the various acts of congress, to 'settle titles to land in the state of California,' the holders of all such patents are liable to be called upon to relitigate their claims with the government in the ordinary courts of justice; and that the patent, instead of being conclusive evidence of a 'settlement' of the title—the end of litigation—is but the foundation for the beginning of a new contest to unsettle it, in the tribunals of the country, *which before had no jurisdiction whatever over the subject-matter*. The very institution of these suits in the name, and by the authority of the government, was well calculated to produce, and undoubtedly did produce, a general distrust of such titles, and a wide-spread if not a well-founded alarm." (Id. 85-6.) It is a still more "startling proposition," that any citizen at his own option, thirteen years after a claim for confirmation of a Mexican grant has been presented to the proper tribunals of the country, and nearly three years after the decree of confirmation has been affirmed by the supreme court of the United States, and pending the survey and final location and during the ordinary delays incident to issuing a patent, can by a mere entry or trespass upon the lands so claimed, and in litigation between the government and the claimant, *acquire a status*, that will enable him to attack and avoid the whole proceedings; and for his own benefit control the title vested by the patent under the grant, in which grant he has no interest. In this case there is no attack on the genuineness of the grant. It is only the location of the grant that is assailed. Upon the inviolability of the location, Mr. Justice Field, with the concurrence of the circuit and district judges, in *United States v. Flint*, 4 Saw. 61, said: "As to the alleged error in the survey of the claim, it need only be observed that the whole subject of surveys upon confirmed grants, except as provided by the act of 1860, which did not embrace this case, was under the control of the land department, and was not subject to the su-

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pervision of the courts. Whether the survey conforms to the claim confirmed, or varies from it, is a matter with which the courts have nothing to do; that belongs to a department whose action is not the subject of review by the judiciary in any case, however erroneous. The courts can only examine into the correctness of a survey when in a controversy between parties, it is alleged that the survey made infringes upon the prior rights of one of them; and can then look into it only so far as may be necessary to protect such rights. They cannot order a new survey, or change that already made." This was said in a case where the United States was complainant in the bill. *A fortiori*, must this be true as to a party having the *status* of the complainant in this bill. In the conclusions stated by Hoffman, Judge, in *United States v. Flint*, 4 Saw. 84, 85, and especially in 1, 2, 3, and 6, I fully concur. (See also pages 86, 87.) The government, to carry out the provisions of the treaty, committed this whole matter to other and special tribunals, except so far as brought before the ordinary courts for review or appeal. The circuit courts in the exercise of their general and ordinary jurisdiction had nothing to do with it. If this location is declared void in this proceeding, and the defendant be decreed to convey to the complainant, the court has no power to relocate the grant, or remand the case to any other court, board, or officer to relocate it; and although the *government* is satisfied with the location, the grantee of a genuine Mexican grant of eleven leagues will lose the land granted. The proceedings for confirmation and location of the grant having resulted in a patent after a fourteen years' litigation, all the tribunals and officers to whom the special jurisdiction over the matter was committed, have become *functi officio*.

If this court should now assume jurisdiction to vacate the location, it cannot do equity by giving other lands in place of those taken away. Besides, in the mean time, relying upon this location, other parties may have acquired from the government the title to all other lands upon which it might be located. These patents ought not to be lightly interfered with, at the will or caprice of parties entering

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upon lands claimed under Mexican grants pending proceedings for confirmation and location, and setting up *recent claims* under general pre-emption laws, or laws authorizing the location and purchase of mines. Whether this case has any feature that brings it within any of the exceptions stated in the last cases cited, it will be time enough to determine when the United States files a bill to vacate the patent on the ground of the frauds charged. In my opinion, the bill presents no ground for equitable relief.

So, also, in my judgment, the suit in analogy to the statute of limitations of the state, is barred by lapse of time. If complainant is entitled to any relief, it is wholly on the ground of fraud. Such suits are barred within three years. (Code Civ. Proc., sec. 338, clause 4.) According to the allegations of the bill, the fraud was consummated October 27, 1867. The bill was filed September 8, 1880, nearly thirteen years afterwards. The statutory period had, therefore, run more than four times before the filing of the bill, unless the case is within the provision that the cause of action shall "not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." It is attempted to take the case out of the statute by the simple averment: "That your orator never heard of the various actings and doings hereinbefore in articles XII, XIII, XIV, XV, XVI, XVII, XVIII, and XIX of this bill set forth, or any of them, until within two years last past." No reason is given for not discovering the fraud. There, certainly, should be some showing on this point, in view of the public and notorious acts alleged. The bill is singularly barren of allegations of specific facts, though amply full as to general charges of facts and legal conclusions *on information and belief*. The complainant does not state who his grantor is, or who any one of the other locators of some four hundred mining claims described as belonging to him is, nor when they, or any of them, were conveyed to him or his grantor, except that they were conveyed to his grantor before October 27, 1867, and to himself, after that date. He mentions no date except the date of the act of congress of 1866, the date of the Mexican grant of 1846, and

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of the patent October 27, 1867. No date of any of the deeds, act of incorporation, or other transactions since October 27, 1867, are given, to enable the court to determine from the facts, whether he ought to have discovered the frauds charged at an earlier date than alleged. For aught that appears, he may have received his conveyance from his grantor the day before he commenced his suit, or he may have received it as early as October 28, 1867. It is not even distinctly averred that his immediate grantor was not fully informed of the acts of fraud, though it appears inferentially in article XII as a reason for not applying for a patent. But there is no averment at all as to the knowledge of the other parties who must have located the numerous mining claims, and, for aught that appears, might have conveyed to his grantor on the day before the issue of the patent, and with full knowledge of the frauds charged.

The great and substantial facts in the case are all facts of public record, and public proceedings under the law, and of public notoriety. The survey and the patent are of record, and open to everybody's inspection and examination. The incorporation of the defendant is a matter of public record. Notice of the survey appears from the allegations of the bill to have been published under the statute, and to have produced its proper results, as the bill shows upon its face, that parties other than complainant's grantor actually appeared in the surveyor-general's office as provided by statute, and filed therein, objections to the survey on the very fundamental grounds of the frauds stated and relied on in this bill, and that the objections were overruled. Thus not only the survey and patent, but the very facts charged as the equitable grounds for relief in this bill, were put on the public records of the surveyor-general's office, and ruled upon by that office. The facts charged and the rulings, therefore, became public records, prior to October 27, 1867, open to the inspection and examination of all; so also the fact, if it be a fact, that the grant was located in such a manner that it did not approach within six miles at the nearest point, or within twenty miles of some points of the exterior bounds of the tract within which it could law-

fully be located, and did not include the residence of said Maria, or follow the *espediente*, or decree, was upon record in the survey, and in the patent, and must have been known to complainant and his grantor; for it is alleged that the knowledge of the patent, and belief that it was valid, is the reason why they did not apply for patents for their numerous mining claims. It was therefore known that the patent covered them. And it would appear from the allegations of the bill, inferentially, if not by direct averment, that plaintiff's grantor was for years in possession of his numerous mines with that knowledge. All these are great, notorious, and public facts *actually known* to complainant's grantor, and presumptively to all mankind; and they are the fundamental facts of the fraud upon which whatever equity there is in this bill rests. They are such facts as must, necessarily, have put the complainant and his grantor upon inquiry, and have long ago led to the discovery of the frauds. They were facts, which they were bound to notice, if they did not do so in fact. They furnish a clue, which if followed with reasonable diligence, would not require thirteen years to lead to the fraudulent acts of the parties charged. Even now, the frauds are not positively alleged, but are cautiously charged upon information and belief; and the defendant is called upon by numerous interrogatories to furnish the proof of the frauds alleged. Certainly the known facts were sufficient to arouse suspicion, and enable the complainant or his grantor to file a bill of *discovery* on *information and belief long ago*. The location of the grant was in the nature of a proceeding *in rem*, and the party had a right under the statute to file objections, and some actually did, alleging these very frauds now charged. These allegations were, therefore, of public record. Parties cannot disregard known facts, that lead to frauds affecting their rights, and in the language of Mr. Justice Bradley, "then claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world *must move on*, and those who claim an interest in persons or things must be charged with knowledge of their *status* and condition, and of the vicissitudes to

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which they are subject. This is the foundation of all judicial proceedings *in rem*." (*Broderick's Will*, 21 Wall. 519.) It must not be forgotten, not only that the world "moves on," but that in this age and country, and in this part of the country, it moves rapidly. Three years now, and especially in California, is longer in events and progress, than twenty years some centuries ago, when the statutes of limitation were adopted in England. Parties cannot lie down to sleep upon their rights, and on waking up many years afterwards find them in the same condition as that in which they were left. The observations of the chief justice in *Vance v. Burbanks*, 101 U. S. 520, are not inappropriate to this case. Among other things, he says, with reference to the facts of that case: "If any was in fact not sent forward, and Scott did not discover the omission until one year of the time of the commencement of this suit, he must have been grossly neglectful of his own interests." The same may be said of the complainant in this case. If the open, known, notorious facts suggested in the bill and apparent upon the public records of the county, did not, in fact, put the complainant and his "grantor" upon inquiry, and lead them to a discovery of the frauds charged, at least, sufficiently to afford as good a basis upon which to file a bill of discovery containing general and sweeping charges "upon information and belief" as that upon which the present bill rests, they must, indeed, "have been grossly neglectful of their own interests."

In my judgment, upon both grounds discussed, the bill fails to present any grounds for the relief sought, and it is manifest, under the views expressed, that the bill cannot be truthfully so amended as to obviate the objections. The demurrer to the bill is sustained and the bill dismissed. Let a decree be entered accordingly.

FRANK STEWART ET AL. v. SHIP AUSTRIA. FANNIE
D. B. PIPER v. SHIP AUSTRIA.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

JANUARY 31, 1882.

1. "INEVITABLE ACCIDENT."

Before HOFFMAN, Judge.

M. Andros, for libellants.

W. H. L. Barnes, for claimants.

HOFFMAN, J. On the eighth of March, 1881, the ship *Austria* and the scow-schooner *Modoc* were lying at a pier on the north side of a slip in Oakland Long Wharf. The *Modoc* arrived at about twelve or one o'clock, and made fast to the wharf astern of the *Austria*—the latter being farther up the wharf, towards its head. At about four o'clock P. M., the *Modoc* moved farther up the slip to a position south and abreast of the *Austria*, with the object of getting under her lee, as the weather had become threatening. She put out several lines to the wharf forward and astern of the *Austria*, and attached one to the latter vessel about amidships. The wind continued, as night came on, to increase in violence, and at about eight o'clock the *Modoc* was hailed from the *Austria* to let go the line attached to that vessel. Before, however, this could be done, the line was cast off by the *Austria's* crew. The *Modoc* then hauled off to the south side of the slip to a position to the south of and not far from abreast of the *Austria*.

A short time afterwards, the schooner was hailed from the *Austria* to get away, as the latter was drifting. She had in fact parted her forward fasts, and her bow was beginning to swing round towards the south before the northerly gale. There seemed to be imminent danger that the schooner would be crushed between the *Austria* and the wharf. She therefore commenced hauling out between the *Austria's* stern and the stern of the *Transit*, a large steamer which was at-

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tached to the southerly pier of the slip. In so doing, her boat was crushed, but whether by contact with the *Austria*, or by the falling of the schooner's main boom, the topping-lift of which had fouled with the rigging of the *Transit*, is disputed. The *Modoc* continued to haul over towards the southerly pier, which she finally reached, but foundered almost immediately on coming in contact with it. The *Austria's* bows in the mean time had continued to swing around until they were checked by her bowsprit coming in contact with the railroad company's sheds on the southerly pier. As her stern lines still held, this brought her up, and she remained in the same position during the rest of the night.

It is claimed by the libellants that the accident was the indirect but not remote consequence of the *Austria's* negligence in breaking adrift.

1. The claimants contend that the breaking adrift was the result of inevitable accident; and,

2. That even if the *Austria* was guilty of negligence, the foundering of the schooner was the direct consequence of her being overladen and unseaworthy; that her deck-load had become saturated with water, rendering her crank and top-heavy, and giving her a list to starboard, which constantly increased until she capsized in the heavy sea which was setting in under the piles of the wharf; and that, as there was no actual collision of the vessels, the foundering of the *Modoc* was too remote a consequence of any negligence of which the *Austria* might have been guilty, to render her liable.

The circumstances of this case suggest several interesting questions, which, however, in the view I take of it, do not require a definitive solution.

In general, it would seem, that where a vessel, herself free from fault, has been obliged by the fault of another to change her position, or attempt any other manœuvre, to avoid impending danger, and in doing so sustains an injury, the damage should be deemed to have been caused by the vessel by whose fault she was compelled to incur the risks of making the manœuvre. But in this, as in cases

of apprehended collision, she is bound to exercise reasonable judgment and skill—in the absence of which, the damages will be apportioned. (7 Wall. 203.) But suppose the new position which she is obliged to take is more perilous than her original one, and that, before she can move to a safer position, a storm arises, the consequences of which she would have escaped in her old position. Is the offending vessel, which originally compelled her to shift her position, liable for the damage done by the storm?

Again: A vessel, threatened with injury through the fault of another, is, as already remarked, bound to exercise reasonable skill and diligence to avoid or mitigate its consequences. Is she not also bound to be well conditioned and appointed—with all necessary appliances to avoid a collision, even though the danger of its occurrence may have arisen from the fault of another?

Suppose, for example, that in attempting to escape from an impending collision, a vessel, by reason of defective steering apparatus or rigging, sustains damage which she would have escaped had she been sufficiently provided. Or suppose that, being compelled to slip her anchor, she might readily have secured her safety, had she been provided with proper lines and hawsers, but owing to the entire absence of these she is stranded. Or suppose that she is overladen and unmanageable, and from that cause unable to execute a manœuvre which she might otherwise have safely accomplished.

It would seem, in these and similar cases, that where a vessel is endangered by the fault of another, and unable to secure her safety through the want of the usual and proper appliances and means, she is herself as much in fault as if her inability arose from the want of proper skill and diligence on the part of her officers and crew.

But if her inability has been the result of a peril of the sea or *vis major*, the consequences of which she has been unable to remedy, then her defective means should not be imputed to her as a fault.

It is unnecessary to pursue this subject further. Perhaps what has already been said is superfluous, as it is cer-

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tainly *obiter*. In my judgment, the accident in this case is not to be attributed to the negligence of the *Austria*, but to "inevitable accident." Numerous authorities, defining the meaning of this term and illustrating its application, have been cited at the bar.

It will be sufficient to quote the language of the supreme court in a single case. "Inevitable accident," says the court, "is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. *The highest degree of caution that can be used, is not required. It is enough that it is reasonable under the circumstances, such as is usual in similar cases, and has been found, by long experience, to be sufficient to answer the end in view—the safety of life and property.*" (*The Grace Girdler*, 7 Wall. 203.)

The *Austria* was made fast to the wharf by a gang of stevedores, under the direction of Captain Batchelder, a master stevedore of thirty years' standing, assisted by two foremen of great experience. It is unnecessary to enumerate the various chains and hawsers by which she was attached to the wharf. In the judgment of all concerned in the operation, they were sufficient to secure her safety under all circumstances likely or possible to occur. Two witnesses, and those of no very great experience, suggest that it would have been better to put out her anchor chain. But this criticism is made after the event, and one of them, when informed what fasts were actually put out, admitted that "he thought them sufficient, except in *some great emergency.*"

Captain Batchelder declares that, even with his experience of the result, he would not moor the vessel differently if the work had to be done over again. He expresses the opinion, that if he had put out the anchor chain, it would either have parted or torn out the pile to which it was attached. If the mooring had been insufficient, it would have been easy to establish the fact by the testimony of experts. No stevedore of experience has been called to express such an opinion.

I think, therefore, that the measures adopted by the

Austria were, in the language of the supreme court, "reasonable under the circumstances; such as are usual in similar cases, and have been found, by long experience, to be sufficient to answer the end in view."

It is contended on the part of the libellants that the *Austria* was negligent in not putting out other fasts after the first one had parted. The interval that occurred between the time when her fasts began to part and her bringing up against the shed was from twenty to twenty-five minutes. No expert has been called to state what the persons on board (three in number) could have done, more than they actually did, to prevent the vessel from breaking adrift. They were certainly busy paying out chain, etc., and doing what seemed best to them for the safety of the ship. It is not shown that three men were not the usual and proper crew or watch for a vessel lying in a slip and supposed to be securely fastened to a wharf.

But the conclusive answer to the suggestion is, that the negligence suggested did not and could not have had any effect to avert the disaster.

The schooner was warned to move away when the danger of the ship's breaking adrift became apparent. The latter was in fact brought up by the sheds on the opposite wharf without touching the schooner, though possibly she may have crushed the boat at her stern.

The accident occurred during the attempt of the schooner to get out of the way of the vessel, which she was warned was drifting down on her. That attempt she made as soon as she was apprised of her danger. If then the men on board the ship had succeeded in preventing her bows from breaking adrift, the result would have been in no respect different. She did bring up against the shed, without touching the schooner.

The latter foundered in the attempt to extricate herself from a position of imminent danger. That attempt she had already entered upon, and the result would have been the same if additional fasts sufficient to secure the ship had been put out, and her further drifting thereby arrested,

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just as it was a very short time afterwards by her coming in contact with the sheds.

The negligence, if any, to be imputed to the *Austria*, is negligence in the original mooring; and of this, for the reasons assigned, I do not find her guilty.

Libels dismissed.

UNITED STATES v. SCHUMANN.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

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1. **POWERS OF UNITED STATES ATTORNEY.**—The district attorney of the United States possesses no absolute power to dismiss a criminal charge pending the examination of the accused before a commissioner. He attends the examination only as counsel of the government, to see that the evidence against the accused is properly presented.
2. **SAME.**—Nor has the district attorney any absolute power over a criminal charge pending before a grand jury. His duty requires him to attend its sessions, to advise it as to the law upon points desired, and, when directed, to draw an indictment—but he cannot prevent the consideration of the charge by declaring that the government will not prosecute the case.
3. **SAME.**—After indictment found and before trial commenced, the district attorney has the absolute power to enter a *nolle prosequi*; and after the trial has commenced he can dismiss the prosecution with the consent of the defendant.
4. **THE POWERS AND DUTIES OF COMMISSIONERS** in criminal cases stated.

Before Mr. Justice FIELD, and HOFFMAN, District Judge.

A PARTY by the name of Schumann was arrested at San Francisco upon a charge of having committed a public offense against the laws of the United States, and was taken before an United States commissioner at that city for examination. Whilst the examination was pending, the district attorney proposed to dismiss the charge, contending that he had the absolute right to do so. The commissioner, doubting as to the authority of the district attorney, appealed to Judges Field and Hoffman, of the United States courts, for their opinion as to the power of the district attorney in this respect. The following opinion was rendered in response to this application:

By the Court, Mr. Justice FIELD. We have looked into the question upon which the commissioner has asked the opinion of the court as to the control of the district attorney over criminal proceedings pending before him; and will briefly state the conclusion we have reached. The district attorney, we are informed, asserts an absolute right to dismiss any criminal proceedings before the commissioner both before and after the examination of the accused. The commissioner, on the other hand, denies such control, and insists that his authority is independent of any action of the district attorney, and is to be exercised in all cases as his judgment may dictate upon the evidence presented.

The office of commissioner was created by the act of February 20, 1812, and his duties were at first limited to taking acknowledgments of bail and affidavits. By several subsequent acts his powers have been greatly enlarged. Among other things, he is invested with all the authority to arrest, imprison, or bail offenders against the laws of the United States, which any justice of the peace or other magistrate of any of the United States can exercise under the thirty-third section of the judiciary act of 1789. That section provides that "for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace or other magistrate of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested, imprisoned, or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense."

The same act also authorizes the commissioner, upon any *hearing* before him, when the offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, in his discretion, to require a recognizance from witnesses for their appearance at the trial.

He is thus made a magistrate of the government, exercising functions of the highest importance to the administration of justice. He is an examining and committing

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magistrate, bound to hear all complaints of the commission of any public offense against the laws of the United States in his district, to cause the offender to be arrested, to examine into the matters charged, to summon witnesses for the government and for the accused; and to commit for trial or to discharge from arrest according as the evidence tends or fails to support the accusation. For the faithful discharge of his duty in these particulars he alone is accountable. He has no divided responsibility with any other officer of the government; nor is he subject to any other's control.

The district attorney may appear before the commissioner, and attend to the presentation of the evidence—but in that position he is only counsel of the government; he cannot direct what finding the magistrate shall make, nor what course he shall pursue. The magistrate will, indeed, in any case, hesitate to continue an investigation after the prosecution has been abandoned by the legal officer of the government. Still, there may be cases where he will be justified, and more, bound to take such a course.

While the charge is under investigation, before either the commissioner or the grand jury, the district attorney has no absolute power over the case. His duty requires him to attend the sessions of the grand jury; to advise that body of the law upon points desired; to examine witnesses; and, when directed, to draw indictments. But he cannot control the action of that body, and, by declaring that the government will not prosecute any particular case, prevent its consideration. The duty of that body is to inquire into all matters charged to be offenses against the United States, committed or triable in the district, and its power is in this respect unlimited.

It is only at a later stage of the proceedings that the prosecution comes entirely under the direction of the district attorney. After indictment found and until trial commenced, his authority may be said to be absolute. He can then abandon the prosecution at his pleasure. He can enter a *nolle prosequi*, even without the consent of the court. He can do this before the arraignment of the accused; or he may do it after issue joined; he can do it at any time until

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the jury is impaneled; and after the trial has commenced he can do it with the consent of the defendant. Having power to this extent over the prosecution after indictment found, it would seem to be a matter of little practical importance, whether the proceedings terminate at his instance before the commissioner, or subsequently by a *nolle prosequi* before the court. But the question is not as to what course the prosecuting attorney of the government may subsequently pursue in case his direction to the commissioner is disregarded, but how far that officer is bound to act upon the direction; and we are clear that he must act upon his own judgment of the law and evidence, and not upon that of any other person. And it is important that each officer of the government should take his appropriate share of responsibility, without reference to the possible action of others.

EMIL WIEGAND v. WILLIAM COPELAND.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

FEBRUARY 6, 1882.

1. FINAL DECREE.—Whether a decree dissolving a partnership, directing a sale of the partnership property; that certain sums of money and costs, together with the partnership debts, be paid, and the remainder of the proceeds divided between the partners in prescribed proportions, without ascertaining the amounts of the debts, or other sums to be paid, and where other and further provisions are subsequently added to the decree, is a final decree from which an appeal may be taken, *quere?*
2. PARTNERSHIP ASSETS.—Real estate put into the partnership at an agreed valuation, as a part of the capital stock, and so entered upon the books of the firm, and used without objection as partnership property for more than three years, is partnership assets, although the partner originally owning it has made no actual conveyance to the firm, or of one half to the other partner, he having retained the legal title as security for the indebtedness of the other party for his share of the stock. In such case, although the legal title is still in the party originally owning it, he holds it in trust for the partnership, subject to his lien as between him and the other partner.
3. SALE OF REAL ESTATE OF PARTNERSHIP.—Where real estate constitutes a part of the partnership assets, and is in such a condition that it cannot be divided, or it is required to pay the partnership debts, the court has authority, upon a decree of dissolution, to decree a sale of such property,

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and out of the proceeds direct the partnership debts to be paid, any surplus that may remain to be properly divided between the partners.

4. **SUBSEQUENT ERRORS.**—Where there is no error in the decree from which an appeal is specifically taken, or in the proceedings upon which it is based, errors in subsequent orders and proceedings under them, from which no appeal has been taken, cannot be considered.
5. **COSTS IN EQUITY PROCEEDINGS** rest in the sound discretion of the court.

Before SAWYER, Circuit Judge.

THIS is an appeal from the consular court of Yokohama, Japan. The facts illustrating the points decided, sufficiently appear in the opinion of the court.

E. D. Sawyer, for appellant.

George A. Nourse, for respondent.

SAWYER, Circuit Judge. From the record in this case it appears, that, prior to the fifteenth day of June, 1876, the plaintiff and the defendant were each engaged in business at Yokohama, in Japan, as brewers; and that on that day they entered into a copartnership to carry on the business of brewing. The defendant seems to have been the owner of a larger establishment than the plaintiff. It was agreed that the value of the defendant's land, brewery, and what is called his plant (by which, I suppose, is meant the implements and fixtures used in carrying on the business of brewing, etc.), should be estimated and put into the business at thirty thousand dollars. They were to be equal partners; and Wiegand, being unable to contribute his share of that amount, became indebted to Copeland in the sum of fifteen thousand dollars, being one half the value of the property. Soon afterwards, or at about the same time, Wiegand contributed to the copartnership his plant and stock, valued at two thousand four hundred and twenty-one dollars and sixty-four cents. This the consul-general holds—and I think properly, under the testimony—was an additional amount of capital. Copeland took one half the stock and plant of Wiegand, and gave him credit for the amount, one thousand two hundred and ten dollars and eighty-two cents, upon his indebtedness of fifteen thousand dollars for

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one half of the capital, which left him still indebted to the amount of thirteen thousand seven hundred and eighty-nine dollars and eighteen cents.

Copeland did not transfer to Wiegand the legal title to one half of the real estate of the copartnership; but upon the formation of the copartnership, books were opened and the property entered at thirty thousand dollars as capital, and each of the parties was credited with one half of the amount—thirty thousand dollars—at which the real estate, plant, etc., had been agreed to be appraised.

The copartnership business was carried on for three years and a half, and the complainant then filed a bill for a dissolution of the partnership, alleging fraudulent acts and other irregularities on the part of Copeland. The case was tried before Consul-general Van Buren, who found that Copeland had not been guilty of the acts charged, and he would have dismissed the bill, but, as the action had been instituted, it was agreed by the parties that a decree of dissolution of the copartnership should be entered, and the business of the firm wound up. A decree dissolving the copartnership was therefore entered, and the matter referred to an accountant to prepare a statement of the property and accounts of the firm. In his report the accountant finds that the net profits of the copartnership business have amounted to nineteen thousand four hundred and fifty dollars; that, under an arrangement that each partner was to draw one hundred and fifty dollars a month, Copeland has drawn out a little more than that amount, and Wiegand something less; and that, upon striking a general balance, twenty-six thousand two hundred and eighty-seven dollars of the estimated value of the firm assets is found to be the share of Copeland, and six thousand two hundred and fifty dollars that of Wiegand. Thereupon the court entered a decree adjudging these amounts to be the proportions belonging to the parties, respectively, and ordering that the partnership property, including the real estate, plant, etc., be sold at public auction, and the proceeds, after deducting certain sums for expenses, costs, and fees, divided *pro rata* between the parties.

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Subsequently, further proceedings were had in the case, upon which additional provisions were made relative to the manner in which the property should be sold; and all the property of the partnership was, thereupon, sold, in pursuance of the decree and the further direction of the court. Upon the sale it proved that there were no bidders except Copeland; Wiegand being unable to purchase, and the property being apparently situated in a country where no other persons than the plaintiff and defendant were desirous of engaging in the brewing business. The property was bid in by and sold to the defendant, Copeland, for twelve thousand dollars, an amount very much less than the value at which it had been estimated in the report of the accountant and in the decree of the court, where the value of the assets of the firm was set down at thirty-two thousand five hundred and thirty-seven dollars. As a result, Wiegand not only had nothing coming to him, but he was brought in debt to the amount of several thousand dollars. A further decree was thereupon entered, that he pay to Copeland the amount of such indebtedness, and this appeal has, consequently, been taken.

The first question raised by the appellee is, that the appeal is not from a final decree. The decree of December 6, 1879, from which the appeal is in terms taken, being the first decree, determines the rights of the parties, and directs that the property be sold; and that certain sums be paid out to various parties for costs, fees, and expenses, and the remainder divided *pro rata*, according to their respective interests, between the complainant and the defendant. It is insisted that this is not, under the law, a final decree, and that, therefore, an appeal from it does not lie.

It is not entirely clear to my mind, whether or not this is a final decree, within the meaning of the law. It determined certain rights of the parties, and fixed the proportionate amounts due to each upon the assumed valuation of the property of the copartnership. It provided for the payment of certain sums of money to various parties, but without ascertaining the amounts, and the partnership debts. The debts of the firm had not been ascertained by the

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decree, and the amounts to be paid as costs were not determined. There were subsequently further proceedings, and further provisions made having the effect of additional provisions to the decree, by which the mode of sale of the property was prescribed; and still later, after the affairs of the copartnership were settled, the debts, expenses, fees, and costs ascertained, and paid out of the proceeds of the sale, there was entered another further, separate, and final decree, directing that Wiegand pay to Copeland a certain amount, being the balance finally found due him. It is, therefore, a matter of some doubt, whether or not the decree appealed from is properly a final and appealable decree. But the conclusion to which I have come on the merits of the case, makes it unnecessary to definitely determine that question, as the result as to this appeal would in any event be the same.

Assuming, then, for the purposes of this case, the appeal to have been properly taken, the first point made by Wiegand, is, that the property referred to ought not to have been regarded as partnership property, because the legal title to one half of it had not been absolutely conveyed to him by Copeland. Under the terms of the copartnership agreement it was manifestly partnership property, its value being therein fixed at thirty thousand dollars; and upon the commencement of the business of the firm, one half of that amount was charged to each party upon the firm books, and no question as to its not being partnership property was raised during the three and a half years in which the business was being amicably conducted. Besides, Copeland gave Wiegand an acknowledgment in writing that one half of that property was held in trust for him, and a mortgage was given by Wiegand upon his half of the partnership property to secure to Copeland the payment of the fifteen thousand dollars due him on account of his half interest in this property. Wiegand claimed one half of the profits of the copartnership business, and if he was entitled to a full share of the profits, he was, certainly, liable for an equal share of the losses from depreciation in value of the firm assets, or otherwise. I do not understand that, at the time

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the decree appealed from was entered directing that the property be sold, any objection was made upon the part of Wiegand that the shares of the respective parties were not properly ascertained. In the nature of the case it was a species of property which could not be divided; and, in order that it should be distributed to the parties in the proportions to which they were entitled, it was necessary that it should be converted into money. Under the circumstances, the proper and only mode of settling the affairs of the copartnership was a sale and division of the proceeds. I think, therefore, that the court is not in error in holding this to be partnership property, and ordering that it be sold. If the legal title was in Copeland, he still held it in trust for the firm as partnership property.

If, upon the sale, the property had brought the amount at which its value had been estimated, it is highly probable that no question would have been raised as to the correctness of the decree, or the action of the court in this particular. Each of the parties would have received the amount to which he was entitled, and Wiegand would have been content with the sum that he had claimed and received. If any hardship has resulted to Wiegand from the result of the sale, it has accrued from proceedings subsequent to the decree from which the appeal is taken, not a necessary result from the matters decreed, and it is not open to consideration on this appeal. If the property had brought upon the sale a larger amount than its estimated value, there would have been quite a large sum coming to Wiegand; or, even if it had been sold for its estimated value, the result would undoubtedly have been entirely satisfactory to him. The difficulty, then, does not arise from the decree, but from the failure to realize from the property the value which had been put upon it. If there was a depreciation in the value of the property, Wiegand must bear his share of the resulting loss. If there was any fraud or error in the subsequent proceedings, including the direction of the mode of sale, it is not open to review now, because there is no appeal from the subsequent final decree.

Another objection of Wiegand is in reference to the

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costs; it is contended that he should not be required to pay certain costs. In an equity suit of this character, the costs are in the sound discretion of the court, and its decision in that regard is not subject to review. Even if that were not so, I do not think the court unduly exercised its discretion in its decision as to the costs.

The fact is, as found by the consul-general, that Wiegand had no valid ground of complaint. If he had gone on with the business, and had not applied for a dissolution of the copartnership, the probability is, that he would have received his share of the profits, paid his indebtedness to his partner, and been placed upon an equal footing with him in a prosperous business. But, unfortunately for him, he sought a dissolution; and Copeland, after at first successfully resisting his application on the grounds alleged, finally consented to it. The court then by its decree directed that the property be sold and the proceeds divided. It was unfortunate for Wiegand, that, upon the sale, he was unable himself to bid upon the property, and that at that time and place there was no competition; but any hardship or wrong, if any there is, growing out of these circumstances, was subsequent to the decree from which this appeal is taken, and is not open for discussion on this appeal.

I think the decree appealed from is correct, and it must be affirmed; and it is so ordered.

CHUNG YUNE v. F. N. SHURTLEFF.

CIRCUIT COURT, DISTRICT OF OREGON.

FEBRUARY 13, 1882.

LIMITATION OF ACTION TO RECOVER DUTIES—NOTICE TO IMPORTER OF DECISION OF SECRETARY.—Under section 2931 of the revised statutes the importer is not entitled to notice of the decision of the secretary upon an appeal from the collector, and the limitation of ninety days, within which the importer may commence an action under said section to recover duties alleged to have been illegally exacted, commences to run from the date of said decision, and not from the time the importer may have knowledge of it.

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Opinion of the Court—Deady, J.

Before DEADY, District Judge.

W. Scott Bebee, for the plaintiff.*Rufus Mallory*, for the defendant.

DEADY, J. Chung Yune, a Chinese firm of this city, bring this action to recover from defendant—the collector of customs at this port—the sum of one thousand and thirty-four dollars and eighty-four cents, alleged to have been illegally exacted as the duty upon three hundred and seventy-two boxes of sago flour, entered here for consumption.

The importer duly appealed to the secretary of the treasury from the decision of the collector, as to whether the goods were dutiable or not, and on September 27, 1881, the secretary affirmed the action of the collector, but the same was not brought to the knowledge of the plaintiff until October 9, 1881. The action was commenced on December 27, 1881—the ninety-first day after the decision of the secretary.

The defendant demurs to the complaint, for that it appears therefrom that the action was not commenced *within* ninety days from the decision of the secretary, as required by statute.

Section 2931 of the revised statute (section 14 of the act of June 30, 1864, 13 Stat. 214) provides that the decision of the secretary of the treasury on an appeal from a decision of a collector of customs “as to the rate and amount of duties to be paid” on merchandise entered at his port shall be final and conclusive, and such merchandise “shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the secretary on such appeal for any duties which shall have been paid before the date of such decision.”

The plaintiff, admitting, as he must, that this action was not commenced within ninety days from the decision of the secretary, contends that the statute should be construed as if it read—unless the action shall be commenced within ninety days after the importer has knowledge or notice of such decision.

But this construction would be plainly without the letter of the statute and the apparent intention of congress. The act makes the limitation to commence from the date of the secretary's decision, and is silent as to the knowledge of the party or the effect of his want of notice. The decision of the secretary is a public act in writing, filed in the department, and under the present treasury regulations is communicated to the collector and importer. As a matter of fact the plaintiff in this case had notice of decision in twelve days from its date, and therefore had seventy-eight days within which to commence suit. In such a case there is no ground to claim that the law has operated hardly, or so as to prevent the plaintiffs from asserting their rights in court by the use of ordinary diligence.

But a case may occur, it is suggested, where through the negligence of the officials or other cause the importer might not learn of the secretary's decision so as to bring his action within the time, yet even then, as said in substance by Mr. Justice Strong in *Westray v. United States*, 18 Wall. 329, in considering a similar question under the same statute—the court can not require a notice to be given to the importer to prevent the limitation from running when congress has not.

In that case the court held that the importer was not entitled to notice of the liquidation or estimate of duties on his merchandise by the collector, so as to enable him to take his appeal to the secretary of the treasury within ten days thereafter, as the statute requires, but that he must get his information on that point for himself.

If any authority is needed in support of this demurrer, beyond the plain provision of the statute, that case appears to be decisive of this. It is true, that the importer may learn of the decision of the collector more readily than that of the secretary, if no means are taken to furnish him with either. But the law does not require him to be furnished with notice at all. The department, in the administration of the law, has found it just and convenient to direct that notice be given to the importer of the decision of the officer, but the failure to do so does not affect the legal rights of the parties. Notwithstanding the want of formal notice of the

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decision, the importer may immediately sue to recover back the duties alleged to have been illegally exacted, and the limitation upon his right to do so begins to run at the same time. The argument for the demurrer assumes that it was the intention of congress that the importer should have all of ninety days within which to commence his action. But, as in the great majority of cases, one third of that period is more than sufficient for such purpose, the remaining sixty days must have been given to cover any possible contingencies, such as the getting or receiving notice of the decision of the secretary.

This action not having been commenced within ninety days from the decision of the secretary, it is barred by lapse of time, and the demurrer is therefore sustained.

UNITED STATES v. THOMAS B. ODENEAL.

CIRCUIT COURT, DISTRICT OF OREGON.

FEBRUARY 14, 1882.

1. ADVERTISING FOR SUPPLIES BY SUPERINTENDENT OF INDIAN AFFAIRS—
PAYMENT FOR.—The defendant, as superintendent of Indian affairs, published advertisements in two newspapers, inviting proposals for supplies, upon the authority of a general order to that effect, addressed to his predecessor in office by the commissioner of Indian affairs, in which it was stated that the order was made by the direction of the secretary of the interior, and attached copies of said order to the bills for publishing such advertisements: *Held*, that the publication of such advertisements was authorized by the secretary of the interior within the meaning of section 3828 of the revised statutes; and that the payment therefor was a lawful expenditure of the public money intrusted to the superintendent, and ought to be allowed in his accounts.

Before DEADY, District Judge.

Rufus Mallory, for the plaintiff.

The defendant *in propria persona*.

DEADY, J. On March 12, 1872, the defendant, as superintendent of Indian affairs for Oregon, executed a bond to the plaintiff in the penal sum of one hundred thousand dol-

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lars, conditioned that he would "faithfully expend" and "honestly account" for all public moneys that might come into his hands as such officer. In the first quarter of the year 1873, the defendant, acting under this bond, paid out of the public moneys in his hands to C. P. Crandall, publisher of the Oregon Statesman, for advertising for bids for Indian supplies, sixty-one dollars and thirty-six cents, and the Oregonian Publishing Company the sum of fifty-seven dollars and fifty-one cents for a like service. In the examination of his accounts these items were disallowed by the second auditor, with the approbation of the second comptroller, upon the ground that "no written authority of the honorable secretary of the interior is presented to comply with section 3828 of the revised statutes." Subsequently this action was brought to recover these sums—one hundred and eighteen dollars and seventy-eight cents—with interest—as moneys not duly accounted for.

The answer of the defendant admits the receipt and expenditure of the money as stated in the complaint, and then alleges as a defence to the action that on October 22, 1870, a general order was made and issued by the secretary of the interior and signed by the commissioner of Indian affairs, and directed to the superintendent of Indian affairs in Oregon, for his "guidance" in the matter of advertising for proposals to furnish supplies, as follows: "Referring to your letter of the ninth ultimo, submitting the names of newspapers in which advertisements for proposals for supplies required in the Oregon superintendency should be published, I have to advise you that *by direction of the honorable secretary of the interior* you are hereby authorized to publish such advertisements in the Oregon Statesman, Salem, and The Oregonian, Portland, Oregon"—that such order was made general to avoid the delay incident to procuring a special direction from Washington whenever the purchase of supplies became necessary; that the same was unrevoked and in full force at the date of the advertisements and expenditures in question, and that a copy of such order was "attached" to each of the bills for publishing said advertisements. It is also alleged, but unnecessarily,

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that the proposals received under these advertisements were approved by the secretary of the interior and the purchase made accordingly.

The plaintiff demurs to this defence as insufficient, because it does not show that section 3828 of the revised statutes was complied with in expending said moneys.

Said section 3828 (sec. 2 of the act of July 15, 1870, 16 Stat. 308) provides, that "no advertisement, notice, or proposal for any executive department of the government, or for any bureau thereof, or for any office therewith connected, shall be published in any newspaper whatever, except in pursuance of a written authority for such publication from the head of such department; and no bill for any such advertising, or publication, shall be paid, unless there be presented with such bill, a copy of such written authority."

Admitting the truth of the answer, as the demurrer does, it does not distinctly appear from the statement of the account by the auditor or the argument of the counsel for the plaintiff, wherein the defendant failed to comply with said section 3828 of the revised statutes.

For anything in the letter of the statute or the subject-matter regulated by it, the authority to advertise might as well be general as special—that is, might under the terms of the statute be made to comprehend and authorize the publication of successive advertisements of a particular class or kind as well as a single one. Besides, these advertisements, being "for supplies," were such as the law required to be made (sec. 3709 R. S.), and the order of the secretary could only limit the number or place of publishing them, by prescribing the newspapers in which they should be inserted. Whenever the defendant undertook to procure supplies for his superintendency, he was authorized and required by statute (sec. 3709 R. S.), to advertise a "sufficient time" for proposals, subject only to the direction of the secretary as to the newspaper or papers in which the publication should be made.

Neither can the objection be, that the order under which the defendant claims to have acted was made before he went into the office, for any general order or direction of the secre-

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tary concerning the conduct or management of this superintendency continued applicable and in force until revoked or superseded, unaffected by any change of superintendents.

The only other objection that could be made or has been suggested to the authority to publish, is, that it did not "come" from the head of the department—the secretary of the interior—but only the commissioner of Indian affairs, by whom it was signed. The secretary of the interior is charged with the "supervision of public business" relating to the Indians. (Sec. 441, R. S.) In the department of the interior there is a commissioner of Indian affairs, who "shall, *under the direction* of the secretary of the interior, and agreeably to such regulations as the president may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations." (Sec. 463, R. S.) Upon these provisions of law, the commissioner was the proper person for the superintendent to apply to for authority to advertise in the Statesman and Oregonian; and although under section 3828, *supra*, the authority to do so must "come" from the secretary, it would nevertheless properly come to the superintendent *through* the commissioner.

Was it necessary also for the secretary to *sign* the order, as well as direct the commissioner to make it? I think not. The statute does not in terms require that he should, nor does the nature of the business or the relations between the parties make it necessary. The commissioner, as to Indian affairs, is the deputy or representative of the secretary, and the lawful channel of communication with Indian superintendents and agents. Upon the authority of his office, and as the representative of the secretary, he informed the defendant that by the direction of that official he was authorized to publish the advertisement in the newspapers mentioned. The authority professed to come from the head of the department, and it came through the proper officer. No one questions the *bona fides* of the transaction. The money has been honestly and beneficially used for the government, and the defendant ought to be credited with the amount, unless there is some technical difficulty in the way—and I see none.

The demurrer is overruled.

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Statement of Facts.

FRANCIS MORA v. JESUS NUNEZ.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

FEBRUARY 20, 1882.

1. VOID SALE UNDER JUDGMENT FOR TAXES.—A sale of land to the highest bidder under an execution issued upon a personal judgment for taxes, recovered under the statute of California of May 17, 1861 (Stat. 1861, p. 471), requiring the sale of the "smallest quantity that any one will take and pay the judgment," and the tax deed issued upon such sale, are void.
2. MEXICAN GRANT PATENT.—A patent issued upon the confirmation of a Mexican grant under the act of congress of 1851, to ascertain and settle land titles in California in an action at law, is conclusive evidence as against one having no patent, not only of the validity of the grant, but of the correct location of the claim confirmed, so as to embrace the lands as described in the patent.
3. PATENTS—DECREE OF CONFIRMATION, CONFLICT OF.—A claim to certain small tracts of land, church buildings situate thereon, and appurtenances, was confirmed under the act of 1851, in due form surveyed and located under the act of 1860, and patented as so located to Joseph S. Alemany, Bishop of Monterey. Another grant of much larger dimensions was confirmed to Eulogio De Celis, the boundaries described in the decree of confirmation, including the said lands so patented to Bishop Alemany, without any exception of said lands in said decree. The certified survey and plat of said grant, subsequently approved by the order or decree of the district court, and the patent issued thereon, in express terms reserved and excepted the lands before patented to Bishop Alemany, thereby excluding them from the operation of the patent issued to De Celis: *Held*, that whether the said survey and patent rightfully or wrongfully excluded said lands, the patent was conclusive as to the title in an action at law, and the patent including the lands must prevail over the patent excluding them and the decree of confirmation upon which it issued.

Before SAWYER, Circuit Judge.

THIS is an action to recover the lands known as the Mission Rancho of San Fernando, situate in Los Angeles county. The plaintiff, in his complaint, seeks to recover the entire rancho, containing upwards of one hundred and twenty-one thousand acres. But the defendant, by supplemental answer, alleges that the plaintiff, subsequent to the commencement of the action, parted with his title to a large portion of the rancho, the title to which has become vested in the defendant; and the proofs are admitted to be sufficient to sustain the supplemental answer, as to the lands

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described in it. The contest is, therefore, now limited to certain small parcels of land, containing in the aggregate about seventy-six acres, embracing the church and appendages and lands claimed to belong thereto, covered by a patent issued to Archbishop Alemany. The title to these parcels rests, firstly, upon an execution sale; and, secondly, upon a patent to Archbishop Alemany.

In June, 1861, the district attorney of San Joaquin county brought an action in the fifth judicial district in said county of San Joaquin, against Andreas Pico, a resident of Los Angeles county, for certain delinquent taxes levied against said Pico for two fiscal years, ending in March, 1859, and 1860, in the county of San Joaquin, upon lands known as the Moquelemos grant, situated in said county. He prayed judgment for two thousand six hundred and seventy-one dollars, with costs and charges; that the said land and improvements be decreed to be sold to satisfy the taxes and charges; and for such other and further relief as might be just and equitable.

This action is expressly stated in the complaint to be brought in pursuance of an act of the legislature of the state entitled, "An act to legalize and provide for the collection of delinquent taxes in the counties of this state, approved May 17, 1861." This act legalizes the taxes for the fiscal years ending March 1, 1859, and March 1, 1860; and in case they cannot otherwise be collected, provides for collecting them by suit in a prescribed form. The complaint is drawn, and the suit prosecuted, in accordance with the provisions of the act. The defendant, Pico, having been served with summons, appeared and demurred. The demurrer having been overruled, in due time, on December 26, 1861, a personal judgment in default of an answer was rendered against Pico for three thousand three hundred and thirty-nine dollars and fifty-five cents and costs. There was no decree for a sale of the lands upon which the taxes were levied, and upon which they were a lien. No transcript of this judgment was ever filed in Los Angeles county, nor was there any record of a lien of any kind made in that county. On April 29, 1862, an execution, in the

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ordinary form, upon a personal money judgment at law, issued to the sheriff of Los Angeles county, commanding him to satisfy the execution out of the personal property, if sufficient could be found, and, if sufficient could not be found, then, out of the real property "belonging to him (Pico) on the day when the said judgment was docketed in the county aforesaid, or at any time thereafter." There is some ambiguity as to which county, San Joaquin or Los Angeles, this clause refers.

The sheriff's return certified that he "served the said writ of execution by levying on" all the right, title, and interest of Pico in the Rancho San Fernando, in Los Angeles county, but he does not state what acts he performed to constitute the levy. The return also shows that on June 9, 1862, he did "sell the lands and premises above mentioned and described, to Thadeas Amat, he being the highest bidder for the same, to wit, for the sum of two thousand dollars." The lands described and sold embraced upwards of one hundred and twenty-one thousand acres. The published notice of sale, annexed to the return, is that "I shall expose for sale, at public auction, for cash, to the highest bidder," and the sheriff's deed recites that he did "sell the premises at public auction, * * * at which sale the said premises were struck off and sold to Thadeas Amat for the sum of two thousand dollars, the said Thadeas Amat being the highest bidder, and that being the highest sum bidden, and the whole price paid for the same." The foregoing are the facts upon which the title under the execution sale rests.

The title under the patent rests upon the following facts: Joseph Sadoc Alemany, Catholic bishop of the diocese of Monterey, on February 19, 1853, filed his petition with the commissioners to ascertain and settle land titles in California, under the act of congress of 1851, in which he claimed the confirmation to him and his successors of certain church property, described "to be held by him in trust for the religious purposes and uses to which the same have been respectively appropriated," said property consisting of "church edifices, houses for the use of the clergy and those employed in the services of the church, churchyards, burial

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grounds, gardens, orchards, and vineyards, with the necessary buildings thereon and appurtenances," alleging that the same had been recognized as the property of said church by the laws of Mexico in force at the time of the cession of California to the United States. The occupation by the church is claimed in the petition to have commenced some time in the last century. On December 18, 1855, the board of land commissioners confirmed the claim to lands "at the Mission of San Fernando," described in the decree as follows: "The church and the buildings adjoining thereto in a quadrangular form, and the house connected with the same by a yard at the south-west corner of said quadrangle, which are known as the church and Mission buildings of the Mission of San Fernando, situated in the county of Los Angeles, together with the land on which the same are erected, and the curtilages and appurtenances thereto belonging, and the cemetery inclosed with an adobe wall adjoining said church." This decree became final by dismissal of the appeal March 15, 1858.

A survey and plat were made, filed, and certified August 6, 1861, in pursuance of the act of 1860; and a patent issued to said Bishop Alemany, May 13, 1862, embracing eight parcels of land described in the plat and survey, and being the same several parcels particularly described in the third supplemental answer filed in this case. They embraced the orchards and vineyards used by the Mission at a little distance from the church building. The plaintiff has such right of possession as is conferred by said patent.

On October 7, 1852, Eulogio de Celis filed his petition with the said board of land commission, praying a confirmation to him of the Mission of San Fernando Rancho, his title being a "deed of grant" made to him on June 17, 1846, by Pio Pico, governor of California. This petition included the lands hereinbefore mentioned patented to Bishop Alemany. The claim was confirmed July 3, 1855, and the decree became final by dismissal of the appeal, March 15, 1858. The description in the decree of confirmation is as follows: "The land of which confirmation is hereby given, is called the Ex-Mission of San Fernando,

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situate in the county of Los Angeles, and to be located as the boundaries are known and recognized on the seventeenth day of June, 1816. Bounded on the north by the rancho called San Francisco, on the west by the mountains Santa Susanna, on the east by the rancho Miguel, and on the south by the Portosuelo." A survey and plat having been made and filed in 1861, and notice given and the survey returned into court under the act of 1860, afterward, August 14, 1865, proceedings were had in the district court by which the eastern boundary line of the rancho was modified, and subsequently, after the repeal of the act of 1860, an amended survey in pursuance of the said decree modifying said eastern boundary was returned into court. Upon said amended survey, with other amendments and certain reservations approved by the court, a patent was issued to the petitioner and confirmee on January 8, 1873. The title claimed under said grant and patent has become vested in the defendants. In addition to the foregoing facts, it is recited in said patent that "the district court erroneously assumed jurisdiction over said resurvey, and amended and approved the same, reserving therefrom the rancho 'El Encino,' confirmed and patented January 8, 1873, to Vicente de la Ossa *et al.*, and the eight tracts of land known as the Mission of San Fernando, confirmed and patented May 31, 1864, to Joseph S. Alemany, bishop of Monterey, and to his successors, which reservations are satisfactory to the parties legally entitled to this patent, as appears by their acceptance of these presents, as a good and valid patent for the lands confirmed, as aforesaid," and that "the plat hereunto annexed in all respects conforms to the aforesaid decree and survey made on the fourteenth of August, 1865, by the United States district court aforesaid, except that the rancho 'El Encino,' patented January 8, 1873, and the eight tracts of land known as the Mission of San Fernando, patented May 31, 1864, to Joseph S. Alemany, bishop of Monterey, and to his successors, are reserved therefrom." Then follow the other usual recitals, with the certificate of the surveyor-general giving a description of the lands, at the close of which description, it is said, "from which are

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to be deduced the areas of the following described tracts confirmed by the United States district court to other confirmees, which tracts lie entirely within the area comprised by the boundaries described, namely: 1. 'El Encino.' * * * Also, eight tracts of land at the Mission San Fernando, confirmed to Joseph S. Alemany, bishop of Monterey, the boundaries of which are described as follows:" giving the boundaries as set forth in the said patent to Bishop Alemany. The patent then proceeds with the granting clause, by which the United States gives and grants "to the said Eulogio de Celis, and to his heirs, the tract of land embraced and described in the foregoing survey, *excepting and reserving therefrom* the rancho 'El Encino,' * * * and the eight tracts of land known as the Mission of San Fernando, containing in the aggregate seventy-six acres and ninety-four hundredths of an acre, patented May 31, 1864, to Joseph S. Alemany, bishop of Monterey, and his successors."

John T. Doyle, for plaintiff.

E. J. Pringle and B. S. Brooks, for defendant.

SAWYER, Circuit Judge, after stating the facts. The first point argued by counsel is, as to the validity of the sheriff's sale and deed. A sale upon a judgment rendered for unpaid taxes, recovered under the same act, made in the same manner, and the deed containing similar recitals, were held void by the supreme court of the United States in *French v. Edwards*, 13 Wall. 511. The same point was decided the same way by this court in *Le Roy v. Reeves*, 5 Saw. 102, and by the supreme court of California in *Carpenter v. Gann*, 51 Cal. 193, and *Hewell v. Lane*, 53 Id. 213. All these cases arose under the same act. It is attempted to distinguish the present case from those cited, on the ground that those cases were proceedings *in rem*, to enforce liens for taxes upon the lands taxed, strictly in pursuance of the statute; while, in this case, it is claimed that the action is simply one in *assumpsit* at common law to recover a debt due, without any reference to the mode in which the liability accrued; and that the execution in the ordinary form

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upon a personal money judgment was issued to, and property sold under it, in another county, which property had no relation whatever to the taxes, there being no lien upon it till an actual levy of the execution. But upon looking into the judgment roll, it is apparent on the record, that the action is for taxes, and it expressly purports to be brought under the provisions of that act. The allegations of the complaint and all the proceedings are strictly in pursuance of the provisions of that act, and in other respects of the code of civil procedure, which are made applicable by the terms of the act, except so far as limited by that act itself. The complaint described the lands situated in San Joaquin county upon which the taxes were assessed, and upon which they were a lien, and prayed a judgment for sale of the premises to satisfy the lien. But when we come to the judgment which was entered in default of an answer, there is, it is true, simply a personal judgment for so much money. That is to say, only a part of the relief prayed in the complaint, and to which the people were entitled under the act, was granted. Why the district attorney did not take all the relief prayed, and which the statute under which he proceeded authorized, when he had a lien upon the eleven leagues of land upon which the taxes sued for were assessed, does not appear. It is a public historical fact, however, well known in California, that the decree of the district court confirming the Moquelemos grant was, in 1860, reversed by the United States supreme court, upon principles, that would necessarily result, as it finally did, in its ultimate rejection as fraudulent (*United States v. Pico*, 22 How. 407); and, if it is admissible to indulge in conjectures, it is not improbable, that the failure of title to the lands assessed rendered a decree for a sale useless, and made it necessary to look elsewhere for satisfaction of the now baseless taxes sued for assessed against Pico, and the land. Be this as it may, the proceedings up to this point were in strict conformity to the act validating the taxes for those years in question, and providing a mode for their collection, and only fell short, in that the judgment did not give all the relief to which the complainants were entitled.

The act authorized the relief granted in the form granted, and more. The supreme court of California necessarily regarded the action as brought under this act, and as not being otherwise authorized by law, when it, subsequently, reversed the judgment for the tax, as it did, on the ground that there was no averment in the complaint of an inability to otherwise collect the tax, which averment was held to be necessary to show a cause of action. (*People v. Pico*, 20 Cal. 595.) What, then, are the provisions and limitations of that act? One of the provisions is, that "judgments rendered in such cases in the district court shall be docketed and become liens upon *all property of the defendant*, liable to taxation, and may be enforced against the same." (Stat. 1861, 472, sec. 4.) All property of the defendant, then, may be made liable to the personal judgment. Another provision is, that the Code of Civil Procedure is "made applicable to the proceedings under this act, * * * *so far as the same is not inconsistent with the provisions of this act*" (Id., sec. 5), and "*any deed derived from a sale of real property under this act, shall be conclusive, etc.*" * * * "*Provided, that the sheriff in selling said property, shall only sell the smallest quantity that any purchaser will take, and pay the judgment and costs.*" (Id., sec. 5.) There is no remedy or proceeding to enforce civil rights under our laws, except the Code of Civil Procedure, and such other proceedings as are expressly provided for in some other general or special statute. This act, as is seen, therefore, authorizes the personal judgment for a tax, which may be enforced against real property other than that assessed, the Code of Civil Procedure to enforce the tax being applicable only "*so far as the same is not inconsistent with the provision of this act.*" Any deed derived from a sale of *real property under this act* "*shall be conclusive,*" etc., "*provided, that the sheriff in selling, shall only sell the smallest quantity that any purchaser will take, and pay the judgment and costs.*" This is expressly prohibitory language, and is wholly inconsistent with the provisions of the Civil Code authorizing a sale upon executions to the highest bidder, and with any other provisions of our law authorizing a forced sale of real

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property to satisfy any judgment or demand. It takes away the power of the sheriff to sell in any other mode. It governs and controls the sale, and a sale in the prohibited mode is, necessarily, void. The sale was for a tax, merged, it is true, in the judgment. But it was that very case, and no other, that the statute was dealing with; and a sale upon an execution issued upon a judgment for the tax so merged, was the kind of sale at which the prohibition was expressly aimed. It is, also, true, that the execution does not disclose the fact that the judgment was for a tax; but the judgment record does, and that is notice to all the world.

The fact that the execution is regular in form for a money judgment, under the Code of Civil Procedure, can no more affect the power of the sheriff to sell in the mode prohibited, than an execution entirely regular, and apparently valid upon its face, issued upon a judgment absolutely void upon the face of the record. I am unable to distinguish this case from the cases cited, and must hold the sale and the sheriff's deed to be void. This view renders it unnecessary to consider the other objections to the validity of the sale.

As to the second ground relied on for a recovery: It appears from the facts found, that the plaintiff has a patent, issued upon a confirmation of a claim arising under the laws of Mexico, which includes eight small tracts of the land described in the complaint, amounting in the aggregate to a little over seventy-six acres; while the patent of the defendants, in express terms, reserves and excludes those tracts from the operation of their patent. To those tracts, then, the plaintiff has a patent of the United States; and the defendants have none. It is claimed by defendants that their decree of confirmation covers these pieces of land; that they ought, therefore, to have been included in the patent, and that their exclusion was unauthorized and without effect. With respect to the effect of the patent, I do not so understand the law, governing such titles, as applied to actions at law, to recover the possession of lands. As I understand the law, as settled in a long line of decisions in the supreme court of California, and now affirmed and fully established by the decisions of the supreme court of the United States, the patent issued

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upon a confirmed Mexican grant is the final, authentic, and conclusive record which establishes the legal title in the patentee, and that title must prevail in an action at law against any party having no patent to the land. It is conclusive and unassailable collaterally, by any party having no patent. This is so held, following the California decisions, in *Beard v. Federey*, 3 Wall. 492, where the patent is declared to be record evidence that not only the claim is valid, but that the grant "is correctly located now so as to embrace the premises as they are surveyed and described," and that "it is in this effect of the patent as a record of the government that its security and protection chiefly lie." So, also, the principle is asserted in *Mora v. Foster*, 3 Saw. 472, 473, and distinctly affirmed on appeal in *Foster v. Mora*, 98 U. S. 425. The series of the principal California cases on the point will be found cited in *Bissell v. Henshaw*, 1 Saw. 565 *et seq.* It is true, that in *Beard v. Federey*, there was no final decree of confirmation of the opposing grant. But in *Mora v. Foster* there were both a decree of confirmation and a final survey and location of the adverse grants. It is in all respects, including the character of the adverse grant by Pico, confirmed, like the present case. The grant to De Cellis was also like that in *Workman's Case*, 1 Wall. 745, and *Jones' Case*, *Id.* 766. And the claim for the Mission in that case was presented by the bishop for confirmation in the same petition as was the land patented to the bishop in this case.

If one patent is conclusive record evidence in an action at law of the proper location of the land, so must another be; and defendants' patent is as conclusive evidence, in such action, that it is correctly located, so as to exclude these tracts of land, as plaintiff's patent, that it is properly located so as to include them. Each patent is the last act in the series of proceedings for confirmation, and the final and conclusive record as to where the title is, and as to what it covers. It is the final evidence of the matter adjudged between the United States and the claimant. If it shows no right in the patentee as against the United States, it can show none against another patentee of the United States.

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If there is an error in the description, or location, it must be remedied, if it can be remedied at all, elsewhere. Besides, the plaintiff's survey and location were made and became final under the act of 1860. If it was erroneous, the confirmees of defendants' grant had an opportunity under that statute of correcting it. If they did not embrace that opportunity, the failure to do so was owing to their own laches, and the implication to be derived from the decision of the United States supreme court in *Rodrigues v. United States*, 1 Wall. 582, is, that they are bound by the result. So, also, even had both patents covered the land, the origin of the claim confirmed to plaintiff's grantor was long prior to that confirmed to defendants. (See *Henshaw v. Bissell*, 18 Id. 268-69.) But it is not necessary to consider what the rights of the parties would be, had both patents embraced the lands. It is enough for this case, that the final and conclusive record of defendants' title excludes the land, while that of plaintiff's includes it. In my judgment, the public interests and public policy demand, that the principle of the conclusiveness of the patent in collateral proceedings established in the cases referred to, and followed to its logical conclusion in this case, should be rigidly adhered to. The security of titles, and the public peace, require that confidence should be reposed in the action and records of the judicial tribunals of the country, and in the public records and official action of other public officials acting within the scope of the jurisdiction conferred upon them by law; and the patent, in the class of cases now in question, is the final record of the judgment of those tribunals and public officers to whom, alone, has been committed the jurisdiction to ascertain and determine the matters set forth in the patent. With respect to the claim made by the plaintiff to certain water rights as appurtenant to the said lands patented to Archbishop Alemany, the pleadings do not present the question argued, and, for that reason, I do not decide, or consider it.

There must be findings and judgment for plaintiff for the several small tracts of land described in the patent to Archbishop Alemany, being the same described in defend-

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ants' third supplemental answer, and for the defendants as to the other lands included in the description contained in the complaint. And it is so ordered.

UNITED STATES v. JOHN MULLAN ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

FEBRUARY 27, 1882.

1. **KNOWN MINES—COAL.**—Whatever may have been originally the proper construction of the word "mines," as used in the pre-emption act of 1841 (5 Stat. 456), the act of July 1, 1864 (13 Stat. 343), gave a legislative construction to the term, which thenceforth attached to all known "coal-beds or coal-fields," in which no interest had before become vested, and withdrew such coal lands from the operation of all other acts of congress.
2. **SCHOOL AND COAL LANDS.**—After July 1, 1864, known coal lands were not subject to selection by the state in lieu of sections 16 and 36 for school purposes; and the secretary of the interior had no authority to list such lands to the state on such selections.
3. **PATENT VACATED.**—Where the state selects a tract of land in lieu of a like quantity of unavailable school lands, which tract so selected is not subject to selection, and the same is listed over to the state by the secretary of the interior, and by the state thereupon patented to private parties, a court of equity upon a bill filed by the United States will annul the selection, listing over, and patent, whether the unlawful acts arose out of fraud, inadvertence, or mistake, or errors of law committed by the officers upon known facts, as to the authority of the state to select, or the secretary of the interior to list over.
4. **BILL FILED BY ATTORNEY-GENERAL.**—Where a bill in chancery to annul a patent to land is filed in the name of the United States, having the signature of the attorney-general of the United States, subscribed by his authority, the court is authorized to entertain the bill.
5. **VESTED RIGHTS.**—The state has no indefeasible vested right to select lands in lieu of sections 16 and 36 from any particular class of lands at any time before selection actually made. Until selection, congress may withdraw any lands from the operation of laws permitting their selection.

Before SAWYER, Circuit Judge.

THIS is a bill in equity to vacate a state selection, a listing to the state by the secretary of the interior, and a patent issued by the state in pursuance thereof, to the north half of section eight, T. 1 N., R. 1 E., Mt. Diablo meridian—

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the said tract having been selected by, and listed to the state, as school land in lieu of a half section of one of the sections sixteen, which was for some lawful reason unavailable to the state. The claim is, that, at the time of the selection, listing, and issuing of the patent in question, the land was known coal land, not subject to selection in lieu of school lands, and that the listing over to the state, and issuing of the patent were by fraud, or mistake, or error in law—at all events without authority and unlawful.

The facts as clearly shown by the uncontradicted evidence, are, that the Black Diamond Coal Company took possession of this half section of land as early as 1861; and from that time until after the patent issued, in 1871, continued in the possession of said land, working a coal mine upon it. It had tunnels, drifts, hoisting works, and other machinery, coal bunkers of large capacity, etc., on it, costing many thousands of dollars, and had constructed a railroad operated by steam to transport its coal to New York Landing on the bay, some twelve miles distant, whence it was shipped to market. There was, also, a mining town built upon the land in question, occupied at different times, by from several hundred to over a thousand inhabitants, all engaged in coal mining on this and adjacent lands, or in some way connected with the mining interests, there being no other occasion for a town at that point, and no other occupation for its inhabitants. The lands were situated on the side of Mount Diablo, at an elevated point, the surface rough and broken, of no use for agricultural purposes, and of inconsiderable utility even for pasturing, and of but trifling value for any purpose whatever, other than for the coal mines situated and worked thereon.

The lands were surveyed and sectionized in March, 1864, the surveyor professing to proceed under the act of 1853. The land was indicated on the plats and surveys as coal land. The land was selected as school land at the instance of one Frank Barnard, and at his suggestion and ostensibly for his use, located by Leander Ransom, state locating agent, on June 25, 1865. It was selected at the suggestion, and, doubtless, for the real benefit of the Black Diamond

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Coal Company, which was at that time in occupation. But neither Barnard, nor the company, took measures to perfect the title. On August 28, 1868, the defendant, Mullan, while the Black Diamond Coal Company was actually in possession working the coal mine, both as is admitted in the answer and shown by the proofs, applied to John W. Bost, surveyor-general of California, to purchase the land from the state, as having been selected by the state as school land, in lieu of a corresponding half of a section 16 not available. The surveyor-general objected that it was coal land, and not subject to selection; but said Mullan insisted that it was subject to selection, and that the selection had been approved by the register of the land office; that he was entitled to purchase, having offered to comply with the state law upon the subject, and that if the surveyor-general should refuse to permit a purchase, he could compel him to do so by mandamus. Whereupon, on August 25, 1868, the surveyor-general accepted the application to purchase. On April 27, 1869, he certified the selection to the United States Land Office, and on May 21, 1869, he issued a certificate of purchase to Mullan. On June 3, 1871, the secretary of the interior listed the land to the state "subject to any interfering rights that may exist to them." On March 28, 1871, Mullan assigned his rights to defendant, Avery, but, as testified by Avery, he still retains an interest in the land. On the same day Mullan, also, assigned to Avery any and all right to any claim which had accrued to him against the Black Diamond Coal Company for damages resulting from working the coal mine and taking out coal since the issue to him of a certificate of purchase, upon which assignment, Avery not long afterwards sued the said company, claiming one million three hundred thousand dollars damages for coal taken out of the land. Avery denies that he knew that the Black Diamond Coal Mine was on the land at the time he acquired his interest, but admits that Mullan told him, that it was in the neighborhood of coal, and that there might be coal on it. Mullan, also, states that he never saw the land before his purchase from the state.

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The selection was made by the state, as is claimed, in pursuance of the act of congress of March 3, 1853, extending the pre-emption laws of 1841 over the public lands in California. A state patent, in pursuance of the selection, purchase, and listing, as hereinbefore stated, was issued to defendant, Avery, on April 6, 1871.

Philip Teare, United States attorney, and W. H. L. Barnes,
for complainants.

B. S. Brooks, for defendant.

SAWYER, Circuit Judge, after stating the facts. The first question that arises, is, whether the land in question was open to selection by the state. The pre-emption act of 1841, provides that "*no lands on which are situated any known salines, or mines, shall be liable to entry under and by virtue of the provisions of this act.*" (5 Stat. 456, sec. 10.)

The act of March 3, 1853, extends the pre-emption laws of 1841 over the public lands in California, whether surveyed or unsurveyed, "with the exception of sections 16 and 36, which shall be, and hereby are, granted to the state for the purpose of public schools in each township." "Excepting, also, * * * the *mineral lands*" with other prescribed exceptions, and "with *all the exceptions, conditions, and limitations therein except as herein otherwise provided.*" (10 Stat. 246, sec. 6.) It is further provided in section 7 that when a settlement has been made on sections 16 and 36, before the lands shall be surveyed, reserved, etc., "other lands shall be selected by the proper authorities of the state in lieu thereof." "Nor shall any person obtain the benefit of this act by a settlement or location on *mineral lands.*"

In *Mining Co. v. Consolidated Mining Co.* the supreme court held, "that the land in controversy being mineral lands, and well known to be so when the surveys of it were made, did not pass to the state under the school section grant. It seems equally clear to us that the land is excepted from the grant by the terms of the seventh section of the act of 1853." (102 U. S. 175.)

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If sections 16 and 36, being mineral lands, do not pass by the terms of the statute, there certainly is no good reason for permitting the same kind of lands to be selected under section 7, in lieu of sections 16 and 36. (10 Stat. 247, sec. 7.) In the act of June 1, 1864, it is provided, "that when any tracts, embracing *coal-beds* or *coal-fields*, constituting portions of the public domain, and which, as '*mines*,' are excluded from the *pre-emption act* of 1841, and which, under past legislation, are not liable to ordinary entry, it shall and may be lawful for the president to cause such tracts, in suitable legal subdivisions, to be offered at public sale to the highest bidder," etc. (13 Stat. 343, sec. 1.) The act of March 3, 1865, further provides, that any citizen who "may be in the business of *bona fide* actual coal mining on the public lands * * * shall have the right to enter in legal subdivisions a quantity of land * * * at the minimum price of twenty dollars per acre," etc. (13 Stat. 529, sec. 1.) The act of July 26, 1866, confirms selections made by the state under past legislation, of any lands granted to the state, "provided that no *selection* made by the state *contrary to existing laws* shall be confirmed by this act" as to a certain designated class, "or to *any mineral lands*." (14 Stat. 218, sec. 1.)

Thus it will be seen by a glance at the several provisions of the statutes quoted, that the statute of 1841 in express terms excludes from pre-emption or sale all lands containing "*any known * * * mines*;" and there is no jurisdiction or power in any officer of the government to grant such lands. The act of 1853, extending the said pre-emption laws of 1841 over California, again expressly exempts "the mineral lands," and limits the act of 1841 in its operation by "*all the exceptions, conditions, and limitations therein*, except as herein otherwise provided." One of the exceptions therein, as we have seen, is "*any known * * * mines*;" and this limitation is not otherwise extended in the act of 1853. Again, in section 7, authorizing, in certain cases, the selection of other lands in lieu of sections 16 and 36, it is again carefully provided, that no person shall "obtain the benefits of this act by a settlement or location on mineral lands." Thus, if coal mines are "*known mines*" or

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“mineral lands,” within the meaning of these acts, they were expressly excluded from pre-emption, sale, or *selection* under these acts, and there is no other act authorizing a selection. Are they “known mines” or “mineral lands” within the provisions of the act of Congress?

It is conceded, that prior to the passage of the act of 1864 cited, the land department at Washington did not regard or treat coal lands or coal mines, as mineral lands within the meaning of the prior acts of congress. It is so stated by Commissioner Drummond, *In re Yoakum*. (Copp’s Public Land Laws, 674.) But I am not aware of any judicial construction of these words of the statute, as relating to coal lands. Whatever the proper judicial construction may have been prior to the act of 1864, congress has itself in that act given a legislative construction to the provisions in question, which is conclusive upon the courts and departments from that time forward. Congress may not have the power by a legislative construction which a statute will not bear, to affect the rights of parties already properly and legally vested under the statute, but it may, certainly, give a legislative construction, which shall apply to all future cases, and all subsequent acts. This it has, in my judgment, done in the present instance, whatever the proper prior construction may have been. The language, it has been seen, is, “when any tract embracing *coal-beds* or *coal-fields*, constituting portions of the public domain, and which as ‘mines’ are excluded from the pre-emption act of 1841, and which, under past legislation, are not liable to ordinary private entry,” it shall be lawful to dispose of them in a prescribed mode, entirely different, and on much more onerous terms than are applicable to other public lands, and these terms are modified, but still different from other public lands in several and all subsequent acts of congress. Here is a manifest intent to include coal lands in the definition of the terms “mines, mineral land,” as used in the act of 1841, and “past legislation,” otherwise the whole object and purpose of this part of the act would fail.

There are no coal lands, as such, mentioned in the act of 1841, or “which, ‘as mines,’ are excluded from the pre-

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emption act," or which, under past legislation, are not liable to ordinary private entry, unless they are embraced in the term "mines" or "minerals," as used in the act of 1841 and subsequent acts. Upon any other construction of the act of 1864 and subsequent acts providing for a disposition of the coal lands in the public domain, there would be, absolutely, no lands and no subject-matter upon which these provisions in question could operate, as the coal lands provided for are only such as were excluded as "mines" in the act of 1841 and "past legislation." All coal lands not before excluded as "mines" would be governed by the ordinary statutory provisions, as to a disposition of the public domain. On any other hypothesis, no change in the law would be effected. It appears to me, therefore, to be indisputable, that at least since the act of 1864, and subsequent acts on the subject, coal lands have, by legislative definition of the term "mines," as used in the act of 1841, been excluded from sale, or selection, otherwise than as provided in those acts. In view of these acts, and this legislative definition, also the act of 1866, excepts coal lands improperly selected from confirmation under the terms of that act, and especially under the words, any "mineral lands," in the first section.

There are railroad grants, it is true, which especially and by express terms provide that coal lands shall not be deemed mineral, within the provisions of those acts. But this only shows that, in the opinion of congress, they would be included, if not specially in terms excluded.

From these considerations I am of opinion that the land in question was not subject to selection, and that the secretary of the interior had no power to list over to the state, or the state to grant a valid patent for it. The land not only contained coal mines, but, in the language of the act of 1841, "known mines" of coal, which were being actually and notoriously worked, and had been so worked for a period of seven years at the time defendant Mullan applied for their purchase from the state, and more than eleven years when he assigned to defendant Avery. The state had no vested right, as is claimed by defendant's counsel it had,

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to select lands in lieu of sections 16 and 36, so that the right to select could not be withdrawn from any particular lands, or class of lands, at any time before selection actually made. The infeasible right to any particular land can only attach at the time of selection. (*Ryan v. C. P. R. R. Co.*, 5 Saw. 260, affirmed in 99 U. S. 388; *Hutton v. Frisbie*, 37 Cal. 476; *Frisbie v. Whitney*, 9 Wall. 187.) If she had an infeasible vested right before an actual selection, there could be no final disposition of the public domain, so as to secure to the grantee of the government a perfect title, till all the state selections should be made. If the state had an infeasible vested right to select from any public land, then any grantee of the government before the state's right is satisfied would take the title, subject to be defeated by a subsequent state selection.

Upon the only other substantial question in the case I have as little doubt, viz., that the selection, listing over to the state, and the patent issued thereon by the state, can be decreed void, or annulled, on a bill in chancery directly filed by the United States for that purpose. The numerous decisions cited to show that the examination and decision of the land department upon the facts is conclusive, are mostly, if not all of them, collateral proceedings, where it is sought to attack the acts of those officers at law, and not by direct proceedings by the government, to annul the patent.

In cases like this, there is no jurisdiction or power in the officers of the land department to affect the title of the United States. There were "known mines" on the land openly and notoriously worked. It was an obvious, public, notorious, historical fact, open to everybody's observation. The plats of surveys in the public land office showed it to be so. A public mining town was situate on the land, occupied by miners actually engaged in working the mines. No one could be possibly ignorant of the character of the land, who would investigate, or, in fact, without actually shutting his eyes against open, public, notorious, obvious facts. Mullan must have known, and Avery must have known the truth, or else they were wilfully ignorant and blind to

what the law required them to see and know. They may not have been—probably never were—on the land; and they may have never seen with their own eyes what was going on in that region; but they are bound to know, and will be deemed in law to know, what every one must see, if he will take the trouble to look at land notoriously and obviously occupied as this land was. And the same must be true with respect to the public officers, whose duty it was to deal with the land, having in their office plats and surveys showing that there are known coal mines on the land. There must have been either fraud, mistake, or an error of law upon known facts, in the several transactions resulting in the patent; and either is sufficient to annul it, and is sufficiently presented by the bill.

I am not disposed to think that there was actual wilful fraud intended by either of the defendants, or the officers of the government. It is much more probable, that there was an inadvertence or mistake, or an error in law upon the known facts; for it is scarcely to be believed that the facts were not known, at least to the parties in this region. Indeed they were discussed between the defendant, Mullan, and the surveyor-general of California, and even Avery, upon his own testimony, had his attention in fact called to the probability that coal might be found on the land; and this was, doubtless, one of the inducements to advance money on it. As coal lands had been sold prior to the act of 1864, as ordinary lands, it may be that there was a misapprehension at the local land office as to those lands being open to selection; and the facts prior to the listing being presented by parties at Washington, probably *ex parte*, it would seem that they may not have been fully comprehended or appreciated.

If the secretary of the interior was not in fact informed, and the listing was in ignorance of the facts, then there was an inadvertence, or mistake. If he did know the facts, he acted beyond the scope of his jurisdiction and authority, and his act was void for want of power. That a bill on behalf of the United States will lie to annul those proceedings is clear from the authorities.

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In *Moore v. Robbins*, 96 U. S. 533, the court says upon this point: "If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the *cancellation* of the deed of conveyance of the land as to individuals; and if the government is the party injured, this is the proper course." A patent is the deed of the government.

In *United States v. Stone*, 2 Wall. 535, the court says: "A patent is the highest evidence of title, and is conclusive as against the government, and all claiming under junior patents or titles, *until it is set aside or annulled* by some judicial tribunal. In England this was originally done by *scire facias*; but a bill in chancery is found a more convenient remedy. Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued *unadvisedly or by mistake where the officer has no authority in law to grant them*, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it, acts ministerially, not judicially. *If he issues a patent for land reserved from sale by law, such patent is void for want of authority.* * * * It is contended here by counsel of the United States that the land for which a patent was granted to the appellant was reserved from sale for use of the government, and consequently that the patent was void. And although no fraud is charged in the bill, we have no doubt that such a proceeding in chancery is the proper remedy, and that if the allegations of the bill are supported, that the decree of the court below cancelling the patent should be affirmed." Such a bill is this in relation to lands reserved from selection and patent under the acts in question, and the allegations of the bill are fully sustained by the proofs. *United States v. Hughes*, 4 Wall. 235, and *United States v. Hughes*, 11 How. 555, and *Johnson v. Towsley*, 13 Wall. 83-4, establish the same principle.

In this case there must have been either fraud, an inad-

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vertence, or mistake, or an error of law upon known facts; for in the very nature of things, in view of the open, public, notorious occupation of the lands, and the extensive mining for coal thereon, it is impossible that there could be any error of judgment as to the facts, had the evidence been laid before the officers of the land department of the government.

An objection is made that the bill is not filed by the attorney-general, and in his name. The bill commences, "The United States of America, by Philip Teare, United States attorney, in and for the district of California, brings this bill of complaint, * * * and thereupon your orator complains," etc. It is signed at the foot of the bill after the prayer for relief, "Charles Devens, attorney-general, by Philip Teare, United States attorney for the district of California." I think it appears from the record that the attorney-general brings the suit or authorizes the filing of the bill; has control, and is the responsible manager of the case within the principle stated in *United States v. Throckmorton*, 98 U. S. 70. So, also, it appears to me that the letter of the attorney-general set out in the answer is full authority for the proceeding. But this bill was, also, signed upon authority of another letter of the attorney-general expressly written for the purpose.

This suit is, doubtless, prosecuted at the instigation of the Black Diamond Coal Company, and while the company, after working and exhausting the coal for years without availing itself of the right to purchase the land at a comparatively small sum, as it might, and honestly should have done, and is, therefore, entitled to little sympathy should the defendants gain the land, yet, the United States has seen fit to intervene to vacate the proceedings, as it had a right to do, and there must be a decree for the complainant annulling the state selection, the listing, and the patent issued thereon, and it is so ordered.

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THE CITY OF SALEM—WILLIAM REID, CLAIMANT.*

DISTRICT COURT, DISTRICT OF OREGON.

MARCH 4, 1882.

1. SUFFICIENCY OF AN ANSWER.—*Seem*, that an allegation in an answer that the respondent is "ignorant" of a matter alleged in the libel is sufficient.
2. LIEN OF MATERIAL-MEN.—The libel alleged that S. contracted with R., the owner of a steamboat, to repair her in her home port, and employed the libellants to work at said repairs as ship carpenters: *Held*, that upon the facts stated, and under the lien law of Oregon (Ses. L. 1876, p. 9), which gives a lien upon a boat for the value of labor done thereon at the request of a contractor with the owner, the libellants had a lien for their wages which might be enforced in the admiralty in a suit *in rem*, irrespective of the state of the accounts between S. and R., or the failure of S. to fully perform his contract.
3. LIEN—NATURE AND WAIVER OF.—The lien of the material-man under the Oregon act does not depend upon any expressed intention or conscious purpose on his part to claim it, but it is an incident which the law attaches to the performance of the labor or the delivery of the materials under the circumstances stated, and can only be waived or discharged by an agreement or understanding with him to that effect.
4. LIEN OF MATERIAL-MAN.—The lien upon a vessel given by the law of Oregon to a material-man is in addition to the personal responsibility of the contractor or employer, and takes effect upon the performance of his contract by operation of law, unless waived by an express agreement to that effect, or some affirmative act from which such agreement can be reasonably inferred.
5. WAIVER OF LIEN.—The libellant, a carpenter, testified that when he went to work upon the vessel he trusted his employer, the contractor, to pay him; that is, he expected him to do so, as he had done before, and did not think of claiming a lien upon the vessel until after the contractor had failed: *Held*, that this did not amount to an agreement to waive the lien, nor was it even any evidence of such an agreement.

Before DEADY, District Judge.

David Godsell, for libellants.*William H. Effinger*, for claimant.

DEADY, J. This suit is brought to enforce a lien in favor of the libellants against the steamboat *City of Salem*, a vessel engaged in the navigation of the waters of this state, and owned, enrolled, and licensed at this port.

* Affirmed on appeal to the circuit court, April 28, 1882, SAWYER, C. J.

The libel alleges that during the months of November and December, 1881, and January, 1882, said vessel was in the lawful possession of J. F. Steffen, for the purpose of being repaired; that during those months the libellants, Charles Nelson, Peter Johnson, and Jonas Carlson, at the request of said Steffen, worked upon said boat as ship carpenters "at the agreed rate of wages" of four dollars per day—Nelson for forty-eight days, Johnson twenty-two days, and Carlson twenty-nine days; that there is due said libellants on account of said labor as follows—to Nelson, one hundred and ninety-two dollars, to Johnson, eighty-eight dollars, and to Carlson one hundred and sixteen dollars, no part of which has been paid, and for which they each claim a lien upon said boat under the laws of Oregon and under the general admiralty law.

The respondent, William Reid, answering the libel, says in article I, that the boat belongs to respondent, and was only in possession of Steffen to be repaired upon a contract between them, but that said Steffen was not the agent of said owner "for the purpose of procuring any work or labor" on said boat, nor for any "purpose save that of executing the work he had contracted to do." In article II, the respondent says that he is "ignorant" of the employment of the libellants upon the boat and their claim to a lien thereon for their labor. The third article states, in effect, that Steffen abandoned his contract, and the respondent was compelled to finish said repairs, and that there is now due said Steffen thereon the sum of nine hundred and twenty-seven dollars and fifty cents, which sum the respondent is willing to pay to the creditors of the latter entitled thereto, but is prevented from so doing by the process of the state circuit court issued at the suit of Steffen's creditors, and asks that the respondent be discharged without costs. The libellants except to the second article of the answer as insufficient, and to the third article, and so much of the first as states that Steffen was not the agent of the respondent to employ the libellants, for impertinence.

The exception for insufficiency is disallowed. When a respondent has no knowledge concerning the matter con-

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tained in any article of a libel, according to the precedents, it seems that it is sufficient to say that he is "ignorant" thereof—though I think it would be well to require him also to state what his belief about the matter is, as in answer in chancery. (Ben. Ad., sec. 473).

The contract of a material-man is a maritime one, and may be enforced in admiralty. (Ben. Ad., sec. 267, 268; *The St. Lawrence*, 1 Black, 522; *The Eliza Ladd*, 3 Saw. 519.) All persons who are employed to repair a vessel or do work upon her, are material-men within this rule. (1 Par. S. & A. 141; Ben. Ad., sec. 267, 268.) By the general maritime law, material-men have a lien upon the vessel for the services or supplies furnished by them; but by the admiralty law of the United States, as expounded by its courts, material-men have no lien for services or supplies furnished a vessel in her home port, unless given by the local law; but when so given, such lien may be enforced in the admiralty. (*De Lovio v. Boit*, 2 Mason, 414; *The Planter*, 7 Pet. 324; *The Harrison*, 1 Saw. 353; *The General Smith*, 4 Wheat. 438; *The Lotawana*, 21 Wall. 579; *The Canada*, ante, 173.) The only other question arising upon these exceptions is, have the libellants a lien upon the vessel for their services by the local law—the law of Oregon?

By the act of October 19, 1876 (Ses. L., p. 8), section 17 of the act of December 22, 1853 (Or. L., p. 656), "concerning the liens of mechanics, laborers, and other persons," was amended so as to provide, among other things, that "every boat or vessel used in navigating the waters of this state * * * shall be liable and subjected to a lien * * * for all debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors, or sub-contractors of such owner, or any of them, or with any person having them employed to construct, repair, or launch such boat or vessel, on account of labor done or materials furnished, by mechanics, tradesmen, or others, in the building, repairing, fitting, and furnishing or equipping such boat or vessel." * * * Prior to this amendment, the act only gave a lien for the value of labor or materials done or furnished in

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pursuance of a contract with "the master, owner, agent, or consignee" of the boat. But when done or furnished for a contractor, not such "master, owner, agent, or consignee," the parties had no lien, and often lost the value of their labor and materials by the failure or dishonesty of the contractor. To remedy this evil, the act was amended so as to give all persons a lien for labor or materials furnished in pursuance of a contract with any person authorized to employ labor or purchase materials to repair, fit, furnish, or equip a boat engaged in the navigation of the waters of this state.

The agent, contractor, or subcontractor or the owner of a boat is necessarily authorized by the nature and terms of his agreement of employment to procure the labor and materials necessary to accomplish what he is authorized by or contracted with the owner to do thereon or thereabout. The very general phrase in the amendment—"any person having them [material men] employed to construct, repair," etc., must be construed to mean any person having them so employed by the authority of the owner. For it cannot be supposed that the legislature intended that the "any person" mentioned in the section applies to any one other than a person within the category of persons just before enumerated—that is, a person sustaining some relation to the owner that authorizes him to employ the labor or purchase the material in question.

A mere trespasser or intruder upon the boat of another surely cannot fasten a lien upon it for the value of the labor and materials used in unauthorized repairs thereon. As was said by this court in *The Augusta*, 5 Am. L. T. Rep. 495, "a person who puts work or materials into the ship of another as a mere trespasser or intruder, does not thereby become a material-man, entitled to a lien thereon for the value of such work or materials. But the consent of the owner may be implied from the circumstances of the case. For instance, when the respondent [the owner] contracted with Rutter to repair the vessel, it was necessarily implied that he might employ the libellants, and they might be so employed to work thereon. They are, therefore, not in-

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truders or strangers to this vessel, but persons employed to work thereon with the implied consent of the owner."

It is admitted by the answer that at the time alleged by the libellants they labored on the city of Salem, she was in the possession of Steffen under a contract with the respondent to repair her. This being so, he was authorized to employ the libellants to do any work upon her within the scope of his contract. Assuming that the libellants were employed by Steffen and did the work on the boat as they allege, they thereby acquired a lien thereon for the value of their labor. Neither is it necessary that they should at the time of performing the labor have expressed a purpose or consciously intended to claim a lien therefor upon the vessel. The law gives the lien upon the performance of the labor as a means of securing the payment for it. It is an incident which the law attaches to the transaction, and can only be waived or discharged by an agreement or understanding to that effect on the part of the person entitled to it.

These exceptions for impertinence are well taken. It matters not, so far as the claims of the libellants are concerned, what controversy exists between Steffen and his creditors, or how the respondent is involved in it—whether as garnishee or otherwise. If they performed the work on the respondent's boat, as they allege they did, they have a lien thereon for its value—irrespective of the state of the accounts between him and Steffen—and are entitled to maintain this suit to establish their claim and enforce such lien by the sale of the boat.

They are not creditors of the respondent's, and the only relation between him and them arises out of the fact that he is the owner of a boat upon which they claim a lien for labor. On that account he is entitled to contest the fact of the indebtedness, or to show that the lien given by the law therefor has been waived or discharged, or failing in these, to discharge the lien, by the payment of whatever sum is found due the libellants, and thereby prevent the sale of the boat.

The exception for insufficiency is disallowed, and the exceptions for impertinence are allowed.

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On this day the case was finally heard on the libel, amended answer, and the evidence.

DEADY, J. This case is now submitted on the libel, the amended answer, and the evidence. The only defence made to the libellants' claim of a lien is, that they worked on the boat in pursuance of an agreement with the contractor, F. J. Steffen, that they would look to him "solely" for their pay, and would not claim any lien therefor. There is not a particle of evidence in the case, even tending to prove any such agreement.

Steffen was engaged in the business of building and repairing boats, and the libellants were employed by him, from time to time, to work by the day at whatever job he might have on hand. When he commenced to repair the *City of Salem* for the respondent, he set the libellants to work on her without any express agreement as to the wages or the payment of them. He was in the habit of paying them the wages claimed in the libel, and there is no doubt but that it was understood between him and the libellants that he would pay them the customary wages.

But it is argued that because the libellants or some of them testified that when they went to work on the boat they trusted Steffen, and expected him to pay them as theretofore, and did not think of resorting to the boat for their wages until the contractor failed, that therefore they trusted Steffen *exclusively* and waived their lien on the boat.

But this position is clearly untenable. The contractor is personally responsible to his workmen for their wages, independent of the lien. This is the legal effect of their employment. Therefore, they had a right to look to him for payment—to trust him to perform his obligation, without in the least impairing their lien. The lien is given by the law in addition to the personal liability of the contractor, and as a security therefor. (*The Nestor*, 1 Sum. 84.)

It operates and takes effect in favor of the workman without any thought or action on his part, other than the due performance of his contract. Therefore, he is not bound

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in any way to assert his intention to claim or rely upon the lien. The law takes care of him in this respect, even if he is unaware of its existence; and he can only be deprived of this security by an express agreement to waive or relinquish it, or by some affirmative act, from which such an agreement may be reasonably inferred. Thus, an agreement with the contractor to trust him exclusively—to look to him alone for the payment of the wages and therefore not the vessel, would prevent the lien from attaching. (*The Nestor*, 1 Sum. 75.)

There must be a decree for each of the libellants for his wages as carpenter, at the rate of four dollars per day, as follows—Charles Nelson, forty-eight days, one hundred and ninety-two dollars; Peter Johnson, twenty-two days, eighty-eight dollars; and Jonas Carlson, twenty-nine days, one hundred and sixteen dollars—in all, three hundred and ninety-six dollars, with legal interest since February 1st, and costs and expenses of suit.

THE PING-ON.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MARCH 6, 1882.

1. JURISDICTION.—An appeal lies to the circuit court for the district of California from the judgment of the consular court when the amount of the judgment exceeds two thousand five hundred dollars.
2. SECURITY.—Where a sum of money was deposited in the registry of the consular court in lieu of an appeal bond: *Held*, sufficient.
3. MISJOINDER OF RESPONDENTS IN CROSS LIBEL: *Held*, too late to raise the objection for the first time in the appellate court.
4. COLLISION.—Where two steamers were approaching on such courses as to enable each to make the green light of the other on her starboard bow, and one vessel ported her helm: *Held*, that she was in fault. If by reason of smoke the vessel which ported her helm could not discern either of the side lights of the approaching steamer, it was her duty to blow her whistle and to slow or stop until the course of the approaching vessel could be ascertained.

Before SAWYER, Circuit Judge, and HOFFMAN, District Judge.

APPEALS from United States Consular Court at Shanghai, China.

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Selden S. Wright and M. Andros, for appellant.

McAllister & Bergen, for respondent.

By the Court, HOFFMAN, J. This case comes before us on appeal from a decree rendered by the United States consular court at Shanghai, China, on a cross-libel filed by the appellees against the appellants. A preliminary objection to the jurisdiction of this court must first be considered.

The revised statutes, sections 4092, 4093, 4094, and 4109, in substance, provide, that in all cases where the matter in dispute exceeds two thousand five hundred dollars, an appeal from the final judgment of any consular court shall be allowed to the circuit court for the district of California. In cases where the matter in dispute exceeds five hundred dollars, and does not exceed two thousand five hundred dollars, the appeal lies to the United States minister. The latter has also original jurisdiction in cases where a consular officer is interested either as a party or a witness, and from his final judgment in such cases an appeal lies to the circuit court for the district of California, when the amount in dispute, exclusive of costs, exceeds two thousand five hundred dollars. As the amount in dispute in the present cause exceeds two thousand five hundred dollars, exclusive of costs, the right to appeal to this court would seem, under these provisions, to be clear and unquestionable.

It is contended that they are modified and controlled by the provisions of section 4107. That section, in substance, provides:

A. "That the consul shall have jurisdiction in all cases where the damages demanded do not exceed five hundred dollars; and in such cases, if he sees fit to decide the same without aid, his judgment shall be final.

B. "That in any case he may, and when the damages demanded exceed five hundred dollars, he must, summon to sit with him on the hearing of the cause not less than two nor more than three citizens of the United States, etc.

C. "If the consul and his associates concur in opinion, the judgment shall be final. But if either of the associates

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differ in opinion from the consul, either party may appeal to the minister.

D. "The consul shall, in all cases, give judgment in the case; and if no appeal is lawfully claimed, the decision of the consul shall be final."

One of the associates in the case at bar differed in opinion from the consul. It is claimed that under section 4107 the appeal should have been taken to the minister. It is obvious that if this be the legal effect of the provisions of section 4107, the provisions of sections 4092, 4093, 4094, and 4109 are not merely modified and restricted, but they are in great part abrogated and repealed, and the various sections of the act are irreconcilably contradictory and conflicting.

If the appeal lies to the minister, exclusively, in all cases where the associates do not unanimously concur in opinion with the consul, then the provisions of section 4093, which allow an appeal to the circuit court, for the district of California, from *any* final judgment in *any* consular court when the matter in dispute, exclusive of costs, exceeds two thousand five hundred dollars, are repealed or become inoperative. For, if the associates differ, the appeal is to the minister, and if they concur, the judgment of the consul is final.

The provisions of sections 4094, 4109, and 4092 clearly indicate the system congress intended to adopt.

In suits for five hundred dollars or less, the decision of the consular court is final, unless the consul sees fit to call in associates and they differ in opinion. In suits for more than five hundred dollars, and not more than two thousand five hundred dollars, an appeal lies to the minister, whose judgment is final. In suits for more than two thousand five hundred dollars the appeal lies to the circuit court for the district of California, and a similar appeal lies from the final judgment of the minister in the *exercise of original jurisdiction* when the amount involved exceeds two thousand five hundred dollars. But this original jurisdiction is confined to cases where the consul is interested either as party or witness. It thus appears that congress has seen fit to withhold, both from the consular court and from the

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minister, final jurisdiction in all cases where the matter in dispute exceeds two thousand five hundred dollars, exclusive of costs, and to provide, in such cases, for an appeal to the circuit court for the district of California.

But if the provisions of section 4107 have the effect contended for, this system is fundamentally changed. For not only is the appeal from the consular court withheld in all cases where the associates concur with the consul, but when they differ the appeal is to the minister exclusively, and from his judgment there is no appeal—such appeal being allowed only from judgments given by him in the exercise of *original jurisdiction*.

It is suggested that these differences and discrepancies may be avoided by construing the words, “either party may appeal to the minister” as permissive merely; and that the right of appeal to the circuit court, given by section 4093, is preserved. But this suggestion seems inadequate to meet the difficulties of the case. If an appeal can be taken in all cases involving more than two thousand five hundred dollars to the circuit court, and if either party may appeal to the minister, to which is the appeal, in case parties disagree? If one prays an appeal to the circuit court, and the other to the minister, how is the consul to determine which shall be granted?

But supposing this embarrassment overcome, the greater difficulty still remains of reconciling the provision that the consul’s judgment shall be final when his associates concur with him in opinion, with the provisions giving an appeal to the circuit court *from any judgment or decree of a consular court where the matter in dispute exceeds the sum of two thousand five hundred dollars*. (Sec. 4093.) The only plausible way of reconciling these seemingly contradictory provisions, which occurs to us, is to construe the provisions of section 4107, which make the judgment of the consul final when concurred in by his associates, and allowing an appeal to the minister when there is a difference of opinion, as referring only to cases in which the matter in dispute does not exceed two thousand five hundred dollars. The provisions of the act would thus be made harmonious and consistent,

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and its principal feature preserved, viz.: to make the judgments of the consul or minister final in all cases where the matter in dispute does not exceed two thousand five hundred dollars, and to allow an appeal to the circuit court in all cases where it is in excess of that amount.

The whole statute upon the subject of the consular and ministerial courts of China and Japan must be construed together, and, if possible, so that there shall be no conflict between its various provisions. A complete and harmonious system for the exercise of appellate jurisdiction from those courts has been provided, and sections 4092 and 4093 confer the jurisdiction. By the former, appeals to the minister are limited to cases involving amounts not less than five hundred dollars and not exceeding two thousand five hundred dollars. By the latter, appellate jurisdiction is given to the United States circuit court for the district of California in "any final judgment in the consular court wherein the amount of the judgment, exclusive of costs, exceeds two thousand five hundred dollars," etc. The special office and purpose of those two sections is to provide for the jurisdiction. Section 4107 only prescribes, to a certain extent, the conditions and limitations under which the jurisdiction provided for by the previous sections shall be exercised. Its provisions must be construed in subordination to the system and provisions of the sections specially defining the jurisdiction. So construing section 4107, we have no doubt that appeals to the minister are allowed by its provisions under the circumstances therein indicated, only in the class of cases over which appellate jurisdiction is given to that officer by section 4092, and that in any case wherein the judgment is for more than two thousand five hundred dollars, etc., an appeal lies to the circuit court for the district of California.

The objection to the jurisdiction is overruled.

It is further contended, that the appeal should be dismissed because no sufficient security was given by the appellant. No bond was in fact given, but the sum of six thousand dollars was deposited in the registry of the consular court in lieu thereof. Section 4117 of the revised

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statutes of the United States provides, that the minister shall, with the advice of the consul, prescribe "the security which shall be required of a party who appeals from the decision." The deposit was taken without objection. It is to be presumed that it was prescribed by the minister with the advice of the consul. It is of the highest order, and far more certain than a bond which may prove of no value, and which the statute does not require. The objection is overruled.

It is contended on the part of the appellant that the decree should be reversed, and the cross-libel dismissed for misjoinder of respondents. The original libel was filed by Clement Phinney Blethen, owner of the American brig *Condor*, against the steamer *Ping-On*, to recover damages in a cause of collision. To this libel Andrew Allison McCaslin, claimant of the *Ping-On*, filed an answer on the twenty-fourth of December, 1879. On the nineteenth of January, 1880, McCaslin applied to the court for leave to file a cross-libel, which, being granted, he, on the twenty-third of January, filed a cross-libel against Blethen as the original libellant, and also against him, C. H. Wells, and others as partners in the Shanghai Tugboat Association, the owner of the steamtug *Fokelin*, which, at the time of the collision, had the *Condor* in tow.

Blethen and the Shanghai Tugboat Association appeared and filed their answer to the cross-libel. The two cases were tried together, and a decree was entered on the cross-libel against Clement Phinney Blethen and C. H. Wells as part owners of the steamtug *Fokelin*, and partners in the Shanghai Tugboat Association. No decree whatever was entered in the original suit. The appeal now before us is from the decree on the cross-libel.

It is obvious that the cross-libel was filed, not against the libellant in the original libel, as owner of the *Condor* alone, but against him and others trading under the style of the Shanghai Tugboat Association, as the supposed owners of the *Fokelin*, by whose fault, in part, the collision is charged to have occurred. The Tugboat Association, and the persons composing it, were thus strangers to the original suit,

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and a new subject-matter was introduced into the litigation, viz.: the liability of the *Fokelin* and her owners for the damage sustained by the *Ping-On*.

It was not the office of a cross-libel to enforce this liability. "Whether the controversy pending is a suit in equity or in admiralty, a cross-bill or libel is a bill or libel brought by a defendant in the suit against the *plaintiff* in the same suit, or against other defendants in the original suit, or against both, touching the matter in question in the original bill or libel. It is brought in the admiralty to obtain full and complete relief to all parties as to the matters charged in the original libel; and in equity the cross-bill is sometimes used to obtain discovery; new and distinct matters not included in the original bill or libel should not be embraced in the cross-suit, as they cannot be properly examined in such suit, for the reason that they constitute the proper subject of a new original bill or libel. Matters auxiliary to the cause of action set forth in the original libel or bill may be included in the cross-suit, and no others, as the cross-suit is in general incidental to and dependent upon the original suit." (*The Dove*, 91 U. S. 385; *Shields et al. v. Barrow*, 17 How. 145; Story's Eq. Pl., sec. 389.)

The original libel was founded on the alleged negligence of the *Ping-On*, whereby the *Condor* was sunk. It was perfectly competent for the owners of the *Ping-On* to seek affirmative relief by cross-libel against the owners of the *Condor*, and the decree would have determined which of the two vessels was in fault.

But the cross-libel in this case not only impleads strangers to the original suit, but it seeks to enforce their liability as the owners of the steamtug *Fokelin*; and the decree rendered was against the respondents as such owners, and not against the master and owners of the *Condor* as such. The fifty-third admiralty rule of the supreme court clearly indicates that parties other than the original parties cannot be joined either as libellants or respondents in a cross-libel.

"Whenever a cross-libel is filed upon any *counter claim* arising out of the same causes of action for which the original libel was filed, the respondents in the cross-libel shall

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give security, in the usual form, to respond in damages as claimed in the cross-libel, unless the court, on good cause shown, shall otherwise direct, *and all proceedings upon the original libel shall be stayed until such security shall be given.*" (Admiralty Rule 53.)

It was surely not intended by this rule to make the right of the original libellant to proceed in his suit depend upon the ability or willingness of strangers, whom the respondent might charge with negligence, to give security to answer his demand, nor compel the libellant himself to become responsible for their negligence, or abandon his suit.

It is objected that it is too late to raise this objection for the first time in the appellate court. There is no doubt that, as a general rule, parties are required to present their objection at the stage of the litigation when the errors, if any, may be corrected without inconvenience or unnecessary expense. If they fail to do so, they will, in the appellate court, be deemed to have waived them. (*The Vanderbilt*, 6 Wall. 230; *The Commander-in-Chief*, 1 Id. 52.) It is contended by the appellants that the objection *was* taken in the court below.

The eighth article of the answer avers, that the Shanghai Tug-boat Association ought not to have been made parties to the suit. But this exception, if such it can be called, points very vaguely to the objection now relied on. It may mean, merely, that the Tug-boat Association ought not to have been sued because they were not liable; or that they ought not to have been joined in a suit against the master and owners of the *Condor*. It does not state, with any distinctness, that they ought not to have been sued on a cross-libel, because they were not parties to the original libel.

The record does not disclose any presentation of this objection to the court, nor any ruling upon it, nor any exception taken to such ruling. The cause was tried on its merits; all parties, so far as appear, submitting to the jurisdiction. Had the point been presented, we must presume that the court would have decided it correctly.

In that case, the cross-libellant could, without inconvenience or considerable expense, have dismissed their cross-

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libel, and set up the same matter in an original libel. It is quite possible that it was not thought necessary to drive them to this merely formal change of procedure. We think it too late, after the cause has been fully heard, and after the appellants have taken their chances of obtaining a favorable decree, for them to raise the objection, substantially, for the first time in this court. We proceed to consider the merits of the cause.

On the twenty-first of November, 1879, the *Condor*, a brig of two hundred and fifty-seven tons, was on a voyage from the port of Nagasaki, Japan, to the port of Shanghai, China. She was at anchor on the Yang-tse river, two or three miles below the Lismore Wreck light; and some distance from where the Woosung or Wangpoo river flows into the Yang-tse-kiang. The steamtug *Fokelin*, on her way to take her in tow, passed the Woosung Light-house about 5 P. M., and on reaching the brig, which was riding to the flood tide, made fast to her port side, and turned her round on a starboard helm.

The two vessels then proceeded towards their port of destination, having the Lismore light slightly on the port bow, and the red sector of the Woosung light a little on the starboard bow, until, when within about three eighths or half a mile from the Lismore light, the white and green lights of a steamer, distant from half a mile to a mile, and bearing from two to two and a half points on the starboard bow, were discovered. The steamer proved to be the *Ping-On*, which had left Shanghai on the same afternoon. No other vessel or light was in sight. The tug and tow continued on a starboard helm, which was a course divergent from that of the *Ping-On*, as indicated by the exposure of her green light.

It was soon perceived by the tug and tow that the steamer was changing her course. The cabin lights aft were gradually shut out, and the red light exposed, until very shortly before the collision all three of her lights came in view. The tug and tow, on perceiving this change of course, blew two whistles to indicate that she was on her starboard helm. To this signal the steamer replied by one

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whistle, indicating that she was porting. She continued to port until both vessels reached the immediate vicinity of the Lismore light, when the steamer struck the *Condor* stem on, nearly amid-ships, and at nearly a right angle. The *Condor* almost immediately sank.

The consular court adjudged that the whole liability for the damages, both to the *Condor* and the *Ping-On*, rested on the tugboat *Fokelin* and her owners, and it made a decree in favor of the *Ping-On* against the respondents, to the cross-libel filed by the owners of the steamer.

The grounds of this decision, as disclosed in the judgment of the consul, are: 1. That the tug and tow did not have a proper lookout. 2. That they were on the wrong side of the channel. 3. That they should have ported instead of starboarding their helms.

1. The first point, though mentioned in the judgment, can hardly be said to have been considered as a separate and independent ground of decision. The court, being of opinion that the tug and tow were on the wrong side of the channel, considers that there should have been a lookout forward in view of "the hazard of their situation and surroundings." The proofs, we think, show that no lookout was stationed forward on the top-gallant forecastle; but they also show, beyond controversy, that on the poop-deck of the *Condor* were three experienced mariners, viz., the master of the *Condor*, the master of the tug, and a pilot who was on board as a passenger. All these agree that they kept a vigilant lookout, and that their position gave them an unobstructed view on all sides, the vessel not being under sail.

The *Ping-On* was, in fact, observed when at a distance of one half or three quarters of a mile, and in ample time to enable the tug to adopt, seasonably, the proper measures to avoid a collision. It is, therefore, we think, evident that the absence of a lookout did not contribute, and could not have contributed to the accident, and that the *Ping-On* was seen from the *Condor's* poop as soon as she could have been discerned by a lookout forward, and even sooner, if the mate of the *Condor*, who was a witness for the libellant,

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is to be credited. (See *The Dexter*, 23 Wall. 69-74; *The Farragut*, 10 Id. 337; *The America*, 92 U. S. 436; *N. Y. & B. T. Co. v. P. & S. S. S. Co.*, 22 How. 471; 1 Pars. Ship. and Adm. 577; *The Shirley v. The Richmond*, 2 Wood. 61.)

2. Were the tug and tow in fault in being on the southern side of the channel? It is stated, in the judgment of the consul, that the "weight of evidence is clear that it is the custom of this port for all vessels coming in and going out, in that part of the river where the collision occurred, to pass on the starboard side of the channel, *i. e.*, incoming vessels on the north, and outgoing vessels on the south side."

We have carefully examined the testimony on this point. We are unable to concur in the conclusions of the consul. There seems, undoubtedly, to be a general practice or understanding such as is stated by the consul, but it appears to be confined to cases where the channel is not clear, or when the lights of approaching vessels are in sight. Several experienced ship-masters and pilots, having no interest in the case, testify: "If the channel is clear, you can go any side of the channel." "If nothing is in the way, a vessel, after passing Lismore light, could please herself." Even Captain McCaslin, master of the *Ping-On*, seems to admit the limitation of the rule contended for by the appellants: "I believe it is a rule to go on the right-hand side when there is any light in sight."

In the judgment of the consul, much reliance seems to be placed on a decision of Sir Edmund Hornsby, of the British Court for Shanghai, in the case of *Hopewell v. The Annie Gray*. But in this case the collision occurred on the Woosung river, and not on the Yang-tse river, where the collision in the case at bar took place; and the learned judge, even as to that river, declines to "enter into the question, whether there is any law or custom, of universal and invariable practice, which compels a vessel to keep a starboard shore;" and he places his decision on the ground that "apart from any law, custom, or practice, good navigation required the *Annie Gray* to keep the Woosung side of the river." It is obvious that this decision can have lit-

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the application to a collision occurring on the Yang-tse river.

The opinion of the learned judge seems to afford some support to the contention of the respondents in this case. He observes: "While the assessors agree that it is open to a vessel to take any clear channel, they expressly dissent from the view that a clear channel is to be considered such when another vessel is approaching it, and would, in her ordinary course, enter it."

If this view of the assessors be correct, and it seems to be approved by the learned judge, it follows that the tug and tow had a right to hold their course along the southerly shore, near which the *Condor* had been anchored, until, at least, the channel, by reason of the approach of another vessel, ceased to be clear, and their liability, if any, will attach, not because, when the *Ping-On* was discovered, they were on the wrong side of the channel, but because, *after* she was discovered, they failed to adopt proper measures to avoid the collision. In this view Captain Dalrymple, one of the assessors summoned by the consul to assist him, concurs. In reply to interrogatory seven, he says: "When the *Ping-On* first sighted the *Condor*, the *Ping-On* had a right to be where she was. When the *Condor* first sighted the *Ping-On*, the *Condor* had a right to be where she was. But, after passing the *Lismore* light, and getting in mid-channel, it is the custom to keep on the starboard and pass vessels on the port helm."

3. Was it the duty of the tug to have ported her helm when the green light of the *Ping-On* was sighted? The court below has applied to the case the provisions of rule 13, as construed by Dr. Lushington in the case of *The Fruiterer v. The Fingal*, Holt, 158. In that case Dr. Lushington observes: "Part of the evidence says they were within two points of meeting end on. I should consider, if they were within two points of meeting end on, they would fall within the latter part of the statement, nearly end on."

But this construction of rules 11 and 13 having given rise to doubt and misapprehension, those rules were explained

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by an order in council July 30, 1868. This order, after reciting the rules, and the fact that there have been doubt and misapprehension concerning the effect of the said two articles, declares that her Majesty, by virtue of the powers, etc., "is pleased to make the following additions to said regulations, by way of explanation of the said two articles." "Articles 11 and 13, as originally adopted, were as follows:

"Article 11. If two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

"Article 13. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other." The additions, by way of explanation, are as follows: "The said two articles, numbered 11 and 13, respectively, only apply to cases where ships are meeting end on, or nearly end on, *in such a manner as to involve the risk of collision*. They, consequently, do not apply to two ships which must, if both keep on their respective courses, pass clear of each other." "The only cases in which the said two articles apply, are: when each of the two ships is end on, or nearly end on to the other; in other words, to cases in which, *by day*, each ship sees the masts of the other in a line with her own; and, *by night*, to cases in which each ship is in such a position as to see both the side lights of the other."

"The said two articles do not apply, *by day*, to cases in which a ship sees another *ahead*, crossing her own course; or *by night*, to cases where the red light of one ship is opposed to the red light of the other; or where the green light of one ship is opposed to the green light of the other; or where a red light without a green light, or a green light without a red light, is seen ahead; or where both green and red lights are seen anywhere but ahead."

It would seem that nothing could be plainer or more explicit than this explanation of the practical application of the phrase, "nearly end on;" and that it removes, as was no

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doubt its design, the dangerous vagueness of the interpretation given to those words by Dr. Lushington.

Captain Bowen, a witness for the libellants, recognizes, apparently without reference to the rule or the exposition of it, which has been cited, the impropriety of a vessel in the position of the *Condor* changing her course on seeing a green and a white light two points on the starboard bow.

In reply to a question in which the position of the *Condor* and the bearing of the *Ping-On's* green and white lights are stated, he says: "My green light was exposed to his, and I should keep on, taking the left-hand bank of the channel, but only under these circumstances." This witness was called to prove the custom of incoming and outgoing vessels to keep to the starboard side of the channel; but he informs us, that even if on the wrong side of the channel, with the Lismore Light only one half a point on his port bow, he would still hold his course on seeing the white and green lights of an approaching vessel two points on his starboard bow. "If I altered my course, and got into collision, I would consider myself in the wrong."

Captain Dalrymple, one of the assessors, concurs substantially in the opinion of Captain Bowen. In reply to the tenth interrogatory addressed to him by the consul he says: "I think if the tug and *Condor* had ported their helms immediately after hearing the *Ping-On's* whistle announcing that she was porting, there would have been a collision, and I should have thought the *Condor* in the wrong in doing so, as there was not distance enough to have cleared the *Ping-On*."

We are of opinion, that whether the question be determined by the provisions of rule 13, as explained by the order in council, or by the general rules of good navigation, or by the evidence given by experts, the tug and tow were not in fault in not porting when the *Ping-On's* green light was sighted; and as she was not in fault in respect to look-outs, or if in fault, the fault in no way contributed to the accident; and as no fault can be imputed to them in taking the southerly side of the channel, they must be acquitted of all blame, and the decree appealed from must be reversed.

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As this was the only decree entered in the cause, and the appeal from it the only appeal taken, it is not in our power to enter any decree in favor of the *Condor* and against the *Ping-On*.

It may not be improper, however, to make some observations with regard to the liability of the latter.

If we are right in considering the tug and tow free from fault, the collision must be attributed to the fault of the *Ping-On*, or to inevitable accident.

1. The evidence, we think, shows, that if the *Ping-On* had held her course, the vessels would have passed clear of each other.

2. If the *Condor's* green light had been sighted by the steamer on her starboard bow, and the red light not sighted, she was clearly wrong in porting her helm, the vessels not being "end on, or nearly end on," to each other, within the meaning of the rule.

If, by reason of the smoke, neither of the side lights of the tug and tow could be discerned, the steamer had no right to assume that they were approaching end on, or nearly end on, and on that assumption to port her helm. It was her duty to blow her whistle and to slacken her speed (eight miles per hour), or stop until the course of the approaching vessel could be ascertained. Not knowing what indications her lights presented to the other vessel, she had no right to change her course to the starboard, as by blindly so doing, she might, as in fact she did, bring about a collision, and to do so without signalling the other vessel, aggravated the fault. On this point, the decision in the case of the *Rona and Ava*, 5 Mar. Law Cases, 183, is directly applicable. Sir Barnes Peacock, delivering the judgment of the court, says: "It appears to their lordships, that in the construction of the regulation he was mistaken. The vessels were not, at that time, according to his own showing, end on, or nearly end on, within the meaning of the rule. It appears to their lordships, that when he first saw the smoke, and had reason to believe it was caused by a steamer, he ought to have slackened his speed, for he could not tell whether the steamers were end on, or nearly end

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on, or whether they were passing or crossing, or at what rate of speed the *Rona* was going. * * * If the *Ava*, when she first saw the white light of the *Rona*, almost immediately before she saw the green light, had known what were the real position and bearing of that vessel, it certainly would have been a wrong manoeuvre to put her helm hard-a-port. If it be said, on the part of the *Ava*, that at the time the *Rona* was nearly enveloped in her own smoke, the answer is, that if, from the first, the *Ava* had slacked her course until she knew what the real position of the *Rona* was, she need not have been in a position of having to make any manoeuvre in ignorance of the real state of things. * * * After considering the whole of the evidence attentively, their lordships have arrived at the conclusion, that the *Ava* was in fault, in not slackening her speed, and waiting to ascertain, before she ported her helm, what was the real position of the *Rona*." (See *The Centennial*, 14 Wall. 366; *The Louisiana*, 21 How. 1, 5, 6.)

3. If the *Ping-On* was in fault, in porting her helm before ascertaining the position of the *Condor*, she was still more in fault in continuing to port after the *Condor* had announced that she was starboarding, and especially, as she did not know what lights she presented to the *Condor*, and whether the latter might not be right in starboarding her helm.

HUNTER v. SACRAMENTO BEET SUGAR COMPANY.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MARCH 6, 1882.

1. A POWER OF ATTORNEY, "to superintend any real and personal estate, to make contracts, to settle outstanding debts, and generally to do all things that concern my interest in any way real or personal whatsoever, giving my said attorney full power to use my name to release others or bind myself, as he may deem proper and expedient," does not empower the attorney to convey real estate.
2. SAME—RATIFICATION.—An instrument under seal given to the attorney in fact, providing that, I "have this day made and concluded a final settlement with Henry A. Schoolcraft, my acknowledged agent and attorney in fact since the twenty-eighth day of July, 1849, for all the business

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matters and things in any wise appertaining to my interest, and upon such final settlement; I do hereby acknowledge myself to be firmly bound by all his acts as such agent or attorney in fact for me; hereby ratifying and confirming by these presents, whatsoever he may have done in my name or under my seal at any time heretofore, and, also, do I acknowledge the receipt in full of all sums of money, dues, obligations, and other things of said Henry A. Schoolcraft belonging to me, on account of said agency and attorneyship in fact, and that on the part of said Henry A. Schoolcraft there is nothing due or owing to me up to the date of these presents," does not ratify or validate conveyances of real estate made by Schoolcraft assuming to act under the power of attorney mentioned in the first head-note.

Before SAWYER, Circuit Judge.

THIS is an action to recover a tract of land in Sacramento county, being a small portion of the Sutter grant, which grant embraces the city of Sacramento. The plaintiff's title depends upon a conveyance to Samuel Norris, executed by Henry A. Schoolcraft, claiming to act under a power of attorney from John A. Sutter, dated July 28, 1849, and what is claimed to be a ratification of the acts of Schoolcraft by Sutter by deed dated May 20, 1850. On June 28, 1862, Samuel Norris executed to Lloyd Tevis a quitclaim deed to a large amount of property in Sacramento and other counties, consisting of various tracts of land, and other property severally specifically described, after which several descriptions is the clause, "also, any and all other pieces, parcels, or tracts of land, situate in said city and county of Sacramento, or either of them, in, or to which I have any right, title, or interest, whether legal or equitable," under which latter clause whatever right Norris then had in the premises in question passed to Tevis. On May 3, 1871, said Tevis conveyed the premises to the plaintiff, a citizen of Kentucky, the consideration expressed in the deed being one dollar. This is the plaintiff's title. The defendant, the Sacramento Valley Beet Sugar Company, is in possession, deriving title from Sutter through another line of conveyances—one of the conveyances being a deed executed upon a sheriff's sale on a judgment in a case wherein said Samuel Norris was the plaintiff, and one William Muldrow and others, defendants, under which judg-

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ment Norris sold whatever interest the defendants had in the premises. Under this execution sale and sheriff's deed, E. B. Crocker and Robert Robinson went into possession of the premises on May 23, 1858, and continued in possession thenceforth till May 1, 1869, when they conveyed the land and transferred the possession to the defendant, the Sacramento Valley Beet Sugar Company; and said defendant has, thenceforth, continued in possession till the present time. The value of the premises at the date of the commencement of the action was twenty thousand dollars.

H. O. Beatty, for plaintiff.

Freeman & Bates and J. H. McKune, for defendant.

SAWYER, Circuit Judge. The plaintiff in order to recover must show a *legal* title, and his title depends upon the effect of the power of attorney from Sutter to Schoolcraft of July 28, 1849, and the other instrument executed by Sutter to Schoolcraft, claimed to be a ratification of date May 20, 1850. These instruments are set out in full in *Billings v. Morrow*, 7 Cal. 173-4, decided in January, 1857, in which case they were both considered, construed, and their effect declared. It was then held, that the power of attorney conferred on Schoolcraft no power to convey land. This construction has been frequently recognized in subsequent cases. The decision in *De Rutte v. Muldrow*, 16 Cal. 512, is not in conflict with the prior decision on this point. On the contrary, the court says, that it is entirely consistent with that case, to hold, that the power of attorney in question did authorize the making of a lease with a clause giving a right to purchase. There is, certainly, a broad distinction between the power to make an executory contract for a sale of land, and a power to convey land.

One may be made by simple writing, the other is required to be done by deed. I suppose it is competent to authorize one by parol to make, as attorney in fact, an executory contract for the sale of land, even though under the statute of frauds, the contract itself must be in writing. But a power to convey must be under seal, because the deed itself

must be under seal. Thus there is a marked distinction between these powers.

In *Jones v. Marks*, 47 Cal. 243, the decision in *Billings v. Morrow*, although under review, was not questioned on the point that it conferred no power to convey land. Evidently, the court deemed the decision correct on that point, otherwise there would have been no occasion to take so much pains to distinguish it. *Poorman v. Krebs*, presenting the same points, was affirmed on authority of this case. (47 Id. 683.) In *Wilcoxson v. Miller*, 49 Id. 195, the court expressly held that the power of attorney to Schoolcraft did not authorize him to convey lands. It is said by the court: "It is claimed that the lands purporting to have been conveyed by Schoolcraft while acting under a power of attorney from Sutter, came within the exception. But that position cannot be sustained, because the power of attorney did not authorize him to execute conveyances." (Citing *Billings v. Morrow*, and *Jones v. Marks*, *supra*.) Here is an express holding that it carried no such power. Thus that decision has now stood unquestioned and affirmed by the courts for nearly twenty-four years. So also, the instrument claimed to be a ratification was construed in *Billings v. Morrow*, and held not to contain any ratification of the void conveyances by Schoolcraft. The court says: "This paper does not, upon its face, purport to be a ratification of sales made by Schoolcraft, but a deed of settlement between Sutter and his agent, by virtue of the power, of the twenty-eighth of July, 1849, in which he, Sutter, 'acknowledges himself held and firmly bound by all his acts as such agent or attorney in fact,' etc. So far as this deed goes, it can only be regarded as a settlement or adjustment of accounts between principal and agent, and does not contain a single word with regard to any acts of Schoolcraft other than those done by authority of the power of attorney of July 28, 1849, to which reference is made." (7 Id. 174.) Thus it is held that, upon the face of the instrument, it does not purport to ratify any conveyances of land made by Schoolcraft; that "it does not contain a single word with regard to any act of Schoolcraft,

other than those done by authority of the power of attorney of July 28, 1849, to which reference is made.”

The ratification, therefore, is held to be no broader than the power. And in my judgment this construction is correct. It has not been judicially questioned since, so far as I am aware. It is true, the court goes on to advance other objections to the ratification, such as that it does not appear from the deed, or otherwise, that Sutter was at the time of executing the instrument aware that the agent had exceeded his power by conveying lands. But this is entirely another and further reason against giving effect to the asserted ratification. Other difficulties still are suggested. The instrument is merely what it purports to be upon its face, an acknowledgment of settlement of the matters of the agency between the principal and agent, and a sanction of the latter's acts under the power, and a discharge from any further liability to the principal by reason thereof. It mentions no conveyance of real estate, and is no broader in terms than the power. This settlement and discharge were manifestly the purpose of the instrument. Nobody else was a party to it, or had any interest in the settlement. It does not purport to relate to real estate, and could not have been entitled to record, or if recorded, neither the power of attorney, nor the other instrument claimed to be a ratification, would have afforded any definite information as to conveyances of real estate. One reading the power or the other instrument would not be put upon inquiry for conveyances.

It is claimed, that in this case, it is shown by parol evidence, that Sutter, at the time of the execution of the ratifying instrument, was aware that Schoolcraft had conveyed these premises, and that one of the objections suggested by the court in *Billings v. Morrow*, is overcome. If this mode of proof is admissible, then the title to lands would be made to rest in parol, and not upon written evidence. This would, certainly, be a dangerous principle to adopt. But however this may be, the verbal evidence upon the subject is too unreliable, especially considering its source and the circumstances surrounding it, at this late date to satisfy the mind.

The most definite testimony, and the only testimony not too vague to be of any value, is that of Norris, himself, who after so long acquiescence in the opposing title states from memory transactions that occurred more than thirty years before. Titles under which valuable property has been so long held and enjoyed, should not be overturned upon testimony so unsatisfactory. But it was held in *Billings v. Morrow*, that the power of attorney did not authorize the conveyance of land, and that this instrument did not purport to ratify the otherwise void Schoolcraft conveyance. That decision upon these points became a rule of property, which, it must be apparent from the number of cases that have already presented these instruments for the consideration of the supreme court of California, must affect not a little valuable property.

It is not at all unlikely that the defendant may have purchased and improved this very property upon the faith of that decision. Norris himself must have regarded that decision as disposing of his title, for he sold the land under a judgment in his own favor against Muldrow, and the defendant now holds, and it and its grantors have held the premises under title derived through that sale for nearly twenty-four years. Thirteen years after conveyance by Schoolcraft to Norris, and four years after the grantees under Norris' execution sale had been in possession, Norris, apparently, after specifically describing all the property he supposed he had, by the general clause before cited from his deed, conveyed whatever interest he had in the premises to Tevis. It is quite evident, I think, from the perusal of the deed, a consideration of the property conveyed and the consideration expressed, that no great importance was attached to this clause, or the property apparently accidentally caught by it at the time of the conveyance. It was probably a mere makeweight. Nine years later the property, being then of the value of twenty thousand dollars, the defendant and its grantors having been all the time in possession, Tevis conveyed to the plaintiff upon the nominal consideration, as expressed in the deed, of one dollar. Under the circumstances, Norris and his grantees, during

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all the time, could have had but little confidence in the title. It must have been considered by them, as well as by those taking the adverse title, as determined by the decision of the supreme court referred to. It is difficult to account for this long acquiescence on any other hypothesis. It should, certainly, under the circumstances, require a very clear case—a much clearer one than the present—at this late date, to justify overruling the case of *Billings v. Morrow*, which has become a rule of property, or to justify evading it, if that were admissible at all, upon the parol testimony introduced. In either respect, the case made either upon the law or evidence, is, in my judgment, insufficient to justify such action.

Let there be findings and judgment for the defendant.

THOMAS H. BLYTHE v. NICHOLAS LUNING.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MARCH 13, 1882.

1. **MORTGAGE TAX.**—Under section 4, article XIII of the constitution of California of 1879, although the mortgaged property is liable, it is the duty of the mortgagee, and not of the mortgagor, to pay the taxes levied on the money, the payment of which is secured by the mortgage. The tax is the debt of the mortgagee, and not of the mortgagor.
2. **TAX LIEN ON MORTGAGED PROPERTY.**—As the tax is a lien upon the land for the purpose of securing its payment, the mortgagor is permitted to pay the tax as a means of relieving his property from incumbrance, and then deduct the amount so paid from the amount of the debts secured.
3. **SAME—PAYMENT OF MORTGAGOR.**—A tax was levied under said provision of the constitution upon the money secured by mortgage, and the mortgagor tendered the full amount due, less the estimated amount of the tax, the amount not having yet become finally fixed, which the mortgagee refused to accept; and he refused to pay the tax or allow the mortgagor to deduct the amount, or to discharge the mortgage without a full payment irrespective of any tax, "without promise, assurance of, or liability to pay said taxes or any part thereof." The mortgagor then tendered to the mortgagee, under protest, the full amount due without any deduction on account of the tax, which tender was refused. The mortgagor, thereupon, under protest, deposited the full amount due, including the tax, with a banker, for the use of the mortgagee, and notified the

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said mortgagee that the said money was subject to his order, whereupon the mortgagee accepted and received his money, and executed and delivered a satisfaction of the mortgage. The mortgagor was afterwards compelled to pay, and did pay, the tax, in order to enable him to discharge the lien and raise money on another mortgage, and having so paid the same, sued the mortgagee for the amount paid for said taxes: *Held*, that the mortgagor did not voluntarily pay the debt of another, but paid said tax *in invitum* to release his land from the lien, and that he was entitled to recover of said mortgagee the amount of taxes so paid.

Before SAWYER, Circuit Judge.

DEMURRER to the complaint, which alleges the following facts: On October 13, 1879, the complainant, Blythe, borrowed of defendant, Luning, two hundred thousand dollars, for which he executed his note; and to secure payment, a mortgage upon several pieces of real estate in San Francisco, payable two years after date, or on October 13, 1881. The mortgagor covenanted in the mortgage to pay all taxes and assessments that might become a lien on the mortgaged property, "except taxes levied or assessed upon this mortgage, or upon moneys secured hereby." Thus, upon this exception, in express terms, the taxes on the moneys secured were to be paid by the owner, or parties other than the mortgagor. A tax was assessed upon the moneys secured for the fiscal year 1881-2—the lien attaching March 1, 1881. The assessment-roll having been duly equalized, was delivered to the auditor July 25, 1881; and the assessment-roll was equalized by the state board of equalization September 17, 1881. Afterwards, the duplicate tax-list was in due time delivered to the tax-collector. On the maturity of the note and mortgage, October 13, 1881, the complainant tendered to defendant the full amount due thereon, less the sum of three thousand six hundred dollars, the estimated amount of taxes due on said sums secured by the mortgage; but the defendant refused to receive the same, or to pay the taxes thereon, and refused to allow complainant to deduct the amount thereof, and refused to cancel or discharge the mortgage upon any other terms than the unqualified payment of the full amount due upon the face of said note and mortgage, irrespective of any taxes, "without promise, assurance of or liability to pay said taxes, or any

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part thereof." Plaintiff thereupon tendered the full amount without deduction for taxes, under protest. This tender being refused, plaintiff deposited the money with John Parrott subject to defendant's order under protest, and notified defendant of the fact. On October 22, 1881, defendant received the said money from said Parrott, and executed a satisfaction of the mortgage. On October 26, 1881, plaintiff was compelled to pay, and did pay, the whole amount of the taxes, so as aforesaid levied on said moneys so secured by said mortgage, amounting to three thousand seven hundred and fourteen dollars and eighty-one cents. Plaintiff was compelled to pay said taxes in order to discharge the lien for the said taxes upon his said mortgaged lands, to enable him to raise said moneys upon another mortgage, and he would not otherwise have paid them.

McAllister & Bergin, for plaintiff.

Sidney V. Smith, Jun., for defendant.

SAWYER, Circuit Judge. The constitution provides as follows: "A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other *quasi* public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. *The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof; provided,*

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that if any security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year." (Const. Cal., art. XIII, sec. 4.)

Under this provision of the constitution, it was the duty of defendant to pay this tax. He was the party, and the only party, personally liable. It was his debt, and not the debt of plaintiff. The tax, however, is made a lien upon complainant's property as a means of securing its payment to the state. As it is a lien upon the land, the statute and constitution give the mortgagor the right to pay the tax, as a means of relieving his land—a means of securing a speedy discharge of the lien—and allows him to deduct the amount so paid from the amount of his debt secured by the mortgage. But it is insisted that the right under the constitution is *strictissimi juris*; and that as the constitution only provides that, "if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof," he must pay the tax before he pays the debt, and on the subsequent payment of the debt, deduct the amount before paid for taxes therefrom, but cannot pay the whole debt to a creditor who demands the whole, and repudiates any liability on his part to pay any part of the tax, and, afterwards, when compelled to pay the tax in order to relieve the property from the lien in addition to the whole debt, recover the amount from the party whose debt it is; that a payment under such circumstances is a voluntary payment of another's debt, which creates no liability. To adopt this view would be not only to regard the right as *strictissimi juris*, but also, in construing the constitution, to "stick in back." *Qui hæret in litera, hæret in cortice.*

It can make no difference to the creditor, whether the tax is paid first to the state and deducted from the debt, or the whole debt first paid to the creditor on his demand, and then refunded to the debtor, who is afterwards compelled to pay the tax to relieve his property from the lien; while

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for the debtor to first pay the tax to the state, and then enter into a legal controversy with a creditor who repudiates any liability, and the payment on his behalf, and refuses to receive the balance or discharge the lien, might greatly embarrass the debtor in the use or disposition of his property, during the litigation, which may be protracted. When the mortgagor has paid to the mortgagee at maturity all the money which his contract requires, he is entitled to have the mortgaged property completely released from all liens and charges arising out of, and incident to the mortgage; and he is entitled to have an immediate release from all such liens, in order that he may have the free and unobstructed use of his property. He has fully discharged all his liability to the mortgagee under the contract and the law, and he is entitled to have an immediate satisfaction and discharge of all liens and charges growing out of and incident to that contract, which the other party is required to give. The mortgagee, after receiving full satisfaction, cannot, for his own convenience, continue his lien for any portion of the demand against the consent of the mortgagor. It is true that as security for the payment of the tax, he may require the mortgagor either to pay the tax himself, or to pay to him the amount, before releasing the mortgage. The right given to the mortgagor to pay the tax instead of paying the amount to the mortgagee is intended as a benefit to the mortgagor, and for his own protection; and not for the benefit or protection of the mortgagee. To adopt the construction insisted upon by the defendant would be to reverse this principle, and require him in many instances to stop and litigate his rights in advance, at the great hazard of losing his property by reason of his inability to make it available during the litigation. No such hazard was contemplated by the provisions of the constitution in question. In this case the mortgagee repudiated all liability to pay the tax, or any portion of it, levied on his secured loan; although the contract itself, as well as the constitution and law, so required. He accepted the full amount due him upon the contract by taking the money deposited for him under protest. It, therefore, becomes his

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duty to discharge the mortgage and all other liens, incident to the contract. He had received the money from the mortgagor with which to pay the tax. As he declined to pay it, and the mortgagor was unable to use his property by reason of the lien, which the mortgagee was bound to discharge, his payment was *in invitum*, and under *coercion*, or *quasi* legal duress, wrongfully imposed by the mortgagor, and in my judgment he is entitled to recover the amount so paid with interest from the date of payment.

There is no impairing of the obligation of a contract in this case by these constitutional provisions. The new constitution had been adopted at the date of the mortgage, although but partially in force at the time. But, doubtless, the contract was made in anticipation of its going into effect, as it provided in express terms that the mortgagor should not pay the money in question, and by implication that the mortgagee should. The mortgagee was, therefore, bound to pay the tax under the contract, as well as under the constitution and statutes.

Let the demurrer be overruled, with leave to answer in the usual time and on the usual terms.

ISAAC S. COFFIN v. JAMES B. HAGGIN ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MARCH 13, 1882.

1. JURISDICTION—COLLUSIVE PARTIES.—Where parties conveyed land to a stranger, a citizen of another state, without his knowledge and without consideration, for the express purpose of creating a case of jurisdiction in the United States courts, and immediately, with the subsequent consent of the grantee, commenced a suit in the United States circuit court for the benefit of the grantors, expecting a reconveyance, although care was taken that there should be no promise made to reconvey: *Held*, that the transaction was only colorable and collusive for the improper purpose of creating a case of jurisdiction for the courts of the United States within the provisions of the act of congress of 1875, and that the suit must be dismissed for want of jurisdiction.

Before SAWYER, Circuit Judge.

Stetson & Houghton and McAllister & Bergin, for complainant.

Louis T. Haggin and John Garber, for defendants.

By SAWYER, Circuit Judge. On April 15, 1880, one, Bonestell, conveyed to the complainant, Coffin, a citizen and resident of New York city and state, one thousand nine hundred and twenty acres of land, worth, according to his estimate, about twenty thousand dollars—the expressed consideration being ten dollars; but no consideration was in fact paid. The deed was *not recorded*. On the same day Mr. Stebbins, also, conveyed one thousand two hundred and eighty acres in the same vicinity to the same party, costing and worth about ten dollars per acre, including some six dollars per acre expended for procuring water for irrigating—the expressed consideration in this deed being ten dollars; but nothing being in fact paid. Neither Bonestell nor Stebbins knew Coffin, or ever saw him, or had any communication with him upon this or any other subject; and at the date of the conveyances, so far as Bonestell and Stebbins are aware, Coffin knew nothing either of the conveyances, or the intention to convey to him. On April 25, ten days afterwards, and before sufficient time had elapsed to exchange communications by mail, this bill was filed to enjoin the diversion of the waters of Kern river from its channel, which ran through the lands conveyed. The bill alleges the ownership of the land by Coffin, and that Coffin is a citizen of New York, and the defendants citizens of California. The citizenship of the parties is the jurisdictional fact. The several defendants filed pleas to the jurisdiction, denying that Coffin is the *bona fide* owner of the land, but alleging that the land was conveyed to him by Bonestell and Stebbins, respectively, only colorably and collusively for the sole purpose of enabling them to bring the suit and litigate it for their own benefit in the name of Coffin in the United States courts; that they are still the real parties in interest and substantial owners of the land.

The testimony upon the issues raised by these pleas and the replications is mainly that of Bonestell and Stebbins. Neither Coffin nor the attorney who managed the transaction was examined. Bonestell testifies—and the testimony of Stebbins is substantially the same—that he never saw or

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knew Coffin; that he made the conveyance by the advice of Redington for the purpose of beginning this suit (Stebbins' testimony is by advice of counsel); that no consideration was paid; that there was no agreement to reconvey, but he did not know but that he might get it back; that he expected he was to get it back some time, but not a word was said about getting it back; that it was said to him that an absolute deed was necessary without agreement to reconvey to give jurisdiction; that he was advised it was necessary to make an absolute transfer, and he made it; that the purpose was to bring this suit; that he hoped some time to get it back, but could not claim it; that he trusted entirely to Coffin's generosity, because it was considered one of those cases where it was necessary to make such a deed; that the attorney in the case, Mr. Stetson, told him that the deed was at the notary's, and he went there and executed it, and left it there to be called for; that he understood Mr. Coffin was in New York; that he never got the deed again, and don't know what became of it; that he intended it for Mr. Coffin, because his name was in it, and there was no other person for it to go to. Mr. Stebbins testifies to a similar state of facts, and that, although there was no agreement to that effect, he hoped to get something—"I hope the suit on account of which I gave this title will result in establishing the title to the land. I gave the deed for that purpose, and if that purpose is accomplished, I hope to get something for what I have deeded away." He stated that in making the conveyance without any previous consultation with Coffin, a stranger to him, he relied on the honor usually found among men in their transactions with their fellows.

Mr. Redington, who verifies the bill as the attorney in fact of Coffin, says that he knows Coffin; has heard about these deeds, but does not remember having ever seen them; has never had any conversation with Coffin upon the subject of the land; did not suggest to the grantors the making of the deeds; had nothing to do with making the deeds; had no conversation about the deeds, but received a telegram from Coffin requesting him to sign, as his attorney in fact, the papers in Stetson & Houghton's hands, referring, as he

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supposed, to the bill in equity in this case, which he accordingly did sign; that he has held a power of attorney from Coffin for several years. From other testimony it seems that Coffin is a partner of Mr. Redington in a New York firm of which Redington is a member. Mr. Stetson, solicitor of complainant, produced the deeds on request of defendants' solicitors. A clerk in the office of Mr. Stetson testified, that by direction of Mr. Stetson he mailed the deeds to Mr. Coffin at New York on April 15th, in a registered letter, and in due course of mail, about the second or third of May, got a post-office receipt therefor. It does not appear what communication, if any, was made with the deeds; or what response, if any, to any communication was received from Mr. Coffin.

Whether the counsel under whose advice these highly important transactions were had, made any arrangement with Coffin on behalf of the parties in interest not communicated to them, and if so, what arrangement or what communication was had between them upon the subject of the conveyances and suit, does not appear. Whatever occurred—and in view of the great importance of the steps taken, it is natural to suppose that something must have transpired—it is but fair to presume that what did take place between them would not strengthen the complainant's position, for it was important for him to make as strong a case on the pleas as possible. Had these facts been favorable to his view, as they were wholly under complainant's control, it is scarcely probable that he would have omitted to put them in evidence. The defendants themselves have been compelled to go into the camp of their opponents for all their evidence to sustain their pleas. It is not to be presumed, therefore, that the evidence to support the pleas has even a gloss in defendants' favor that the facts will not fully justify.

Thus, to state the facts in the strongest light in favor of the complainant, or complainants, as the case may be, whether nominal or real, I think it clearly appears from the evidence, that the grantors, Bonestell and Stebbins, were desirous of bringing a suit in the United States courts to

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determine their rights to the waters of Kern river, and the United States courts not having jurisdiction over either the subject-matter or the parties, they set about devising some plan by which a case of jurisdiction could be made; that their counsel, Messrs. Stetson & Houghton, advised them that the object could be accomplished by making an absolute conveyance to a citizen of some other state; then bring and prosecute the suit in his name, but that in order not to defeat the jurisdiction, it would be necessary to avoid making any agreement for a reconveyance; that it would be necessary to rely upon the honor of the grantee to reconvey the land; that Mr. Coffin's name was suggested by some one, it does not clearly appear by whom, and accepted; that the deeds were prepared by the counsel, sent to a notary for execution, and the parties notified to go and execute them, which they did, and left the deeds to be handed to Mr. Stetson; and that they subsequently came to his possession; that he caused them to be sent to Mr. Coffin, and immediately upon their receipt, this being the first intimation, so far as appears, to Coffin of the making of these deeds, he, Coffin, telegraphed to Redington to sign, as his attorney in fact, the bill in equity prepared by Stetson, which he accordingly did, and the bill in this case was thereupon filed ten days after the date of the execution of the deeds; that Bonestell thus deeded voluntarily, without consideration, to an entire stranger whom he had never seen or known, and who had no interest whatever in the matter, property of the value of twenty thousand dollars, for the very purpose of making a case of jurisdiction in this court, taking special care not to communicate with him on the subject, and especial care that no one should make any assurance or intimation of any reconveyance; and Stebbins, in like manner and with like precautions, for the same express purpose, conveyed property of the value of more than twelve thousand dollars; that the sole purpose of the said grantors in making the conveyances was to prosecute their contemplated suit in the name of Coffin in the United States courts, but for their own benefit, relying upon Coffin's honor to reconvey at the termination of the litigation, or

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before, and expecting he would so reconvey; that Coffin, upon being informed of the execution of the deeds, co-operated in this plan by immediately authorizing by telegraph the proposed suit to be commenced in his name. What further he may do, of course remains for the future to disclose. He has got standing in his name, however, a large amount of property which was conveyed to him by entire strangers, without consideration, and even without his knowledge, for the sole purpose of giving to the United States courts jurisdiction of a suit to be prosecuted in his name for their own benefit, and relying upon his honor as a man to reconvey to them on or before the accomplishment of their object. Immediately upon receiving the information as to what has taken place, he assents to the bringing of the suit, the papers in which were, doubtless, and must almost necessarily have been, already prepared, and then accepts the situation, and co-operates with his grantors in carrying out their purposes. He does not even await the slow process of communication by mail, but uses the telegraph to express his assent. He does not act of his own motion, but moves upon the suggestion of others to carry out their own purposes. He cannot repudiate the right or claim of his grantors to a reconveyance upon the accomplishment of their purpose, notwithstanding the fact that care was designedly and studiously taken not to commit him by express promise without an act of *perfidy*. To refuse a reconveyance under the circumstances would be a breach of confidence, a breach of faith and trust between man and man of which no honest or honorable man would be guilty.

There can be no possible doubt that this is in fact, whatever it may be in form and appearance, the suit of Bonestell and Stebbins, for their own use and benefit, and that the conveyance and prosecution of the suit in another's name are only colorable and collusive. It is no less so because the agreement and co-operation are tacit and not express. The fact that the conveyances were made by the grantors for their own purposes of bringing and prosecuting the suit without even the knowledge of the grantee, and

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that the grantee immediately, without delay or hesitation, carried out that special purpose upon receiving information of their act and design, shows an assent to their act, a co-operation in their purpose, and further shows that parties have been "collusively made, for the purpose of creating a case cognizable * * * in the said circuit court," and "that such suit does not really and substantially involve a dispute or controversy, properly within the jurisdiction of said circuit court," within the meaning of the provisions of section 5 of the act of 1875. The case of *De Laveaga v. Williams*, 5 Saw. 574, is relied on by complainant to sustain the jurisdiction in this case, and it is, I think, very apparent, that the whole arrangement in this case was made and all the steps taken with especial reference to the rulings in that case—with a preconceived purpose to bring it within that decision. It is true, that that suit was brought since the passage of the act of 1875; but it was considered and decided with reference to the decisions of the supreme court made upon prior acts of congress. I took part in the decision, and, although I thought the question not free from doubt, yet upon the whole, I came to the conclusion that it was in accordance with the rulings of the supreme court as they then stood under the prior statutes. It was not suggested by counsel on the hearing, however, that the provisions of section 5 of the act of 1875, in any degree affected the question, nor did it occur to my mind, nor was the effect of that act considered by the court in deciding the case.

The decision of the supreme court at the present term in *Williams v. Town of Nottawa*, shows that that act has an important bearing upon this question, which must now be considered. In that case the court, by the chief justice, says: "But whatever may have been the practice in this particular, under the act of 1789, there can be no doubt what it should be under the act of 1875. In extending a long way the jurisdiction of the courts of the United States, congress was especially careful to guard against the consequences of collusive transfers to make parties, and made it the duty of the court, on its own motion, without waiting for

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the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court, as well as the parties against fraud upon its jurisdiction; for, as was very properly said by Mr. Justice Miller, speaking for the court, in *Barney v. Baltimore*, *supra*, 'such transfers for such purposes are frauds upon the court, and nothing more.' * * * Inasmuch, therefore, as it was the duty of the circuit court, on its own motion, as soon as the evidence was in, and the collusive character of the case shown, to have stopped all further proceedings and dismissed the suit, the judgment is reversed, and the cause remanded, with instructions to dismiss the suit at the cost of the plaintiff in error, because it did not really and substantially involve a dispute or controversy within the jurisdiction of the court. * * * In this connection we deem it proper to say that this provision of the act of 1875 is a salutary one, and that it is the duty of the circuit courts to exercise their power under it in proper cases." After a full consideration of the facts I am constrained to think that this is a case which the court, under the act of 1875, is required to dismiss on the ground that it is colorably and collusively brought in the name, and with the acquiescence of a party who has really no substantial interest in the matter. I do not wish to be understood as imputing to the parties to this action, or their counsel, anything morally wrong. They are all men of high character. They only sought the jurisdiction of the national courts by means, which, under former statutes, had the sanction of the highest authority.

I find the plea to be true, and that defendants are entitled to have the bill dismissed for want of jurisdiction; and it is so ordered.

SAN MATEO COUNTY v. SOUTHERN PACIFIC RAILROAD COMPANY.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JULY 31, 1882.

1. THE ACT OF CONGRESS OF MARCH 3, 1875—MEANING OF TERMS "ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES." The act of congress of March 3, 1875, in its first section invests the circuit courts of the United States with original cognizance concurrent with the courts of the several states "of all suits of a civil nature at common law or in equity," where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, "arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority." Its second section declares that any suit of that character thus arising, brought in a state court, may be removed by either party into the circuit court of the United States: *Held*, following the decision of the supreme court of the United States in *Railroad Company v. Mississippi*, 102 U. S. 135: 1. That cases are to be considered as arising under the constitution or laws of the United States within the meaning of the act in question, when upon any of their provisions some right, or privilege, or claim, or protection, or defense, in whole or part is asserted in a judicial proceeding; and, 2. That it is therefore sufficient to maintain the jurisdiction of the circuit court of the United States, according to the decision mentioned, that the defence set up in the action necessarily involves a construction of a clause of the federal constitution.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

MOTION to remand cause from the circuit court of the United States to the state court from which it had been removed. The facts appear in the opinion of the court.

Rhodes & Barstow, and Hart, attorney general, for plaintiff.

Lake, Haymond, Bergin, and Bishop & Johnson, for defendant.

By the Court, FIELD, Circuit Justice. This is an action to recover of the Southern Pacific Railroad Company, a corporation created under the laws of California, certain state and county taxes levied upon its property for the fiscal year of 1880 and 1881, and alleged to be due to the plaintiff, with an additional five per cent. for their non-payment

and interest. It was commenced in the superior court of the county of San Mateo.

The railroad company, among other things, sets up in its answer as a defense substantially this: that by the thirteenth article of the constitution of the state, a mortgage or other obligation, by which a debt is secured, is treated, for the purposes of assessment and taxation, as an interest in the property affected; that "except as to railroad and other *quasi* public corporations," the value of the property less the value of the security is to be assessed and taxed to the owner, and the value of the security is to be assessed and taxed to its holder (Sec. 4); that by the same article the franchise, roadway, roadbed, rails, and rolling stock of railroads operated in more than one county, are to be assessed by the state board of equalization at their actual value, and apportioned to the counties, cities, or towns in which the roads are located in proportion to the number of miles of railway laid therein (Sec. 5); that at the time of and previously to the assessment of the property of the railroad company, upon which the taxes claimed in this action were levied, there existed a mortgage upon the property, executed for advances made for the construction and equipment of the road exceeding three thousand dollars for each mile of the same, no part of which has been paid except the accruing interest, and the whole of which was and still is a lien thereon; that the state board of equalization, acting under the authority of the provisions of the state constitution, assessed, as the property of the railroad company, its franchise, roadway, roadbed, rails, and rolling stock at what was deemed to be their actual value, without allowing any deduction for the mortgage subsisting thereon, and thus made as between the property of individuals, and that of the railroad company, an unjust and unlawful discrimination against the company; and that the state constitution in its discriminating provisions conflicts with the inhibition of the fourteenth amendment of the constitution of the United States, which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. Upon that inhibition the company relies to defeat the assessment,

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or at least to reduce it by such deductions as are made in the estimate for taxation of the value of property held by individuals.

The railroad company also sets up, among other things, as a further defense to the action, substantially this: That the section of the thirteenth article of the state constitution, which confers all the authority possessed by the state board to make the assessment complained of, is itself invalid, in this: that whilst it is self-executing, requiring no legislation for its enforcement, it makes no provision for affording to the owners of the property assessed an opportunity to be heard respecting its valuation, but authorizes the board to act without notice to them, without receiving any information from them, and without liability to have its action reviewed, and if erroneous, corrected by any other tribunal, making its judgment, however arbitrary and capricious, final and conclusive. And the company contends, that in thus not affording to it an opportunity to be heard respecting the valuation of its property, whilst an opportunity is afforded to individuals for the correction of errors in the assessed value of their property, a discrimination is made against railroad companies, within the inhibition of the fourteenth amendment.

Claiming, in its answer, protection under the amendment to the federal constitution, against the enforcement of what it alleges to be partial and discriminating provisions of the state constitution, under which the state board acted and by which alone it justifies its action, the railroad company applied by petition to the state court to transfer the action to the circuit court of the United States. The required bond in such cases being filed, the transfer was made. The petition, among other things, alleges that the supreme court of the state has decided that the railroad company is not entitled to the protection of the fourteenth amendment, or to any reductions for its indebtedness secured by mortgage, in the estimate of its taxable property.

The plaintiff now moves, that the action be remanded to the state court for trial, as not being removable to the federal court, under the act of congress of March 3, 1875, to

determine the jurisdiction of the circuit courts, and to regulate the removal of causes to them from the state courts.

By the federal constitution, the judicial power of the United States extends to all cases in law and equity arising under it, and under the laws of the United States, and treaties made under their authority. The act of 1875 in its first section invests the circuit courts of the United States with original cognizance concurrent with the courts of the several states "of all suits of a civil nature at common law or in equity," thus arising, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars. Its second section declares that any suit of that character thus arising, brought in a state court, may be removed by either party into the circuit court of the United States. The terms used in the act—"suits of a civil nature"—are less comprehensive than the term *cases* in the constitution. The latter may embrace proceedings not usually or strictly termed suits, and prosecutions of a criminal nature. There can, therefore, be no serious question as to the validity of the legislation of congress.

The inquiry is as to its meaning; and upon this there might be room for much difference of opinion, if its construction had not already been determined. If we were at liberty to give our view of its meaning, we should not hesitate to limit the authority to remove suits of a civil nature from a state court to a federal court under the act in question to those in which the cause of action arises upon the constitution, laws, or treaties of the United States, and not extend it to cases where the defense, as here, rests merely upon some right or privilege claimed under them. Here the cause of action arises upon the constitution and laws of the state prescribing the manner and conditions on which its sovereign right of taxation shall be exercised. There are eminent fitness and propriety in having all such causes disposed of by the local courts, and in not having them carried into the federal courts with their attendant delays and expense. But the construction we might give, if the question were one of first impression, we are not permitted to give. The supreme court has already passed upon the

meaning of the act, and held in express terms against the view suggested. In *Railroad Company v. Mississippi* (102 U. S. 135), that court reaffirmed what had been previously declared, that cases arising under the laws of the United States are such as grow out of the legislation of congress, whenever any right or privilege, or claim, or protection, or defence of the party in whole or in part is asserted under them. Equally, therefore, cases must be held to arise under the constitution, when upon any of its provisions some right, or privilege, or claim, or protection, or defence in whole or part is asserted in a judicial proceeding. In the *Mississippi* case, which was brought in a state court, the defendant, setting up certain rights claimed under an act of congress, prayed for a removal to a federal court under the act of 1875, and the supreme court held that the party was entitled to it, Mr. Justice Miller dissenting on the ground urged here, that a removal was only authorized when the cause of action was founded on the law of congress, and not where the defence rested upon it; that in this latter case the remedy of the defendant for an adverse ruling was by an appeal after judgment to the supreme court of the United States. The decision of the majority of the court overruling the position of Mr. Justice Miller disposes of the same position taken here.

The construction given by the court is binding upon us until modified or reversed, as fully as though we had participated in it and adopted its conclusions. Long previously to that decision, Chief Justice Marshall, speaking for the court, had held that a case might be said to arise under the constitution or laws of the United States, whenever its decision depended upon the correct construction of either, or when the title or right set up by a party might be defeated by one construction or sustained by the opposite construction. (*Osborne v. Bank of the United States*, 9 Wheat. 822.) If the removal authorized by the act of 1875 is not limited to those cases where the cause of action arises upon the constitution, laws, or treaties of the United States, this ruling of the chief justice would also lead to the conclusion reached in the *Mississippi* case. The validity of the as-

assessment of the property of the railroad company, and of the provisions discriminating between the assessment for taxation of the property of such companies and of the property of individuals, may depend upon the construction given to the fourteenth amendment, and the determination whether it applies to artificial bodies as well as to natural persons. The right of the company to a reduction in the estimate of the value of its property assessed for taxation by the amount of the mortgage thereon, would be defeated by the construction of that amendment for which the plaintiff insists, and might be sustained by the construction for which it contends. Its case for relief, according to the decisions mentioned, therefore arises under the constitution of the United States.

Whether the fourteenth amendment applies to corporations as well as to natural persons, is a question which cannot be determined on this motion. It will come up for determination upon the trial of the action in the consideration of the merits of the company's defence. It is enough to maintain the jurisdiction of this court according to the decisions mentioned, that the defence necessarily involves a construction of a clause of the federal constitution.

It may not, however, be out of place to make some suggestions as to the force of the fourteenth amendment, in order to draw the attention of counsel to the difficulties in its application in the present case, which they must be prepared to meet on the trial. That amendment was undoubtedly proposed for the purpose of fully protecting the newly made citizens of the African race in the enjoyment of their freedom, and to prevent discriminating state legislation against them. The generality of the language used necessarily extends its provisions to all persons of every race and color. Previously to its adoption, the civil rights act had been passed, which declared that citizens of the United States of every race and color, without regard to any previous condition of slavery, or involuntary servitude, except as a punishment for crime, should have the same right in every state and territory to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell,

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own, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens; and should be subject to like punishments, pains, and penalties, and to none other. The validity of this act was questioned in many quarters; and complaints were made that notwithstanding the abolition of slavery and involuntary servitude, the freedmen were in some portions of the country subjected to disabilities, from which others were exempt. There were also complaints of the existence in certain sections in the southern states of a feeling of enmity, growing out of the collisions of the war, towards citizens of the north. Whether these complaints had any just foundation is immaterial. They were believed by many to be well founded, and to prevent any possible legislation hostile to any class from the causes mentioned, and to obviate objections to legislation similar to that embodied in the civil rights act, the fourteenth amendment was adopted. This is manifest from the discussions in congress with reference to it. There was no diversity of opinion as to its object between those who favored and those who opposed its adoption.

The concluding clause of its first section was designed to cover all cases of possible discriminating and partial legislation against any class, in ordaining that no state shall deny to any person within its jurisdiction the equal protection of the laws. Equality of protection is thus made the constitutional right of every person. And this equality of protection implies not only that the same legal remedies shall be afforded to him for the prevention or redress of wrongs and the enforcement of rights, but also that he shall be subjected to no greater burdens or charges than such as are equally imposed upon all others under like circumstances. No one can, therefore, be arbitrarily taxed upon his property at a different rate from that imposed upon similar property of others, similarly situated, and thus made to bear an unequal share of the public burdens. Property may indeed be classified, and different kinds be subjected to different rates. Real property may be taxed at one rate, and personal property at another. Property

in particular places may be taxed for local purposes, whilst property situated elsewhere is exempt. License taxes may also vary in amount, according to the calling or business for which they are exacted. But arbitrary distinctions, not arising from real differences in the character or situation of the property, or which do not operate alike upon all property of the same kind, similarly situated, are forbidden by the amendment. Equality in the imposition of burdens is the constitutional rule, as applied to the property of individuals, where it is subject to taxation at all; and this imports that an uniform mode shall be followed in the estimate of its value, and that the contribution exacted shall be in some uniform proportion to such value, prescribed according to the nature or position of the property. All state action, constitutional or legislative, impinging upon the enforcement of this rule, must give way before it. Congress, in its legislation since the adoption of the amendment, has recognized this to be the rule. The amendment was adopted in 1868, and in 1870 congress re-enacted the civil rights act, and to the clause that all persons within the jurisdiction of the United States should enjoy the same rights as white citizens, and be subject only to like punishment, pains, and penalties, it added, and be subject only to like "*taxes, licenses, and exactions of every kind, and to no other.*" (R. S., sec. 1977.)

Looking at the object of the amendment, it must be admitted that it was intended primarily for the protection of the rights of natural persons; its language is mainly applicable to them. If it also include artificial persons as corporations, whenever its language is susceptible of application to them, it must be because the artificial entity is composed of natural persons whose rights are protected in those of the corporation. It may be that the chain which binds the individuals into a single artificial body, does not keep them in their united form from the protection of the amendment. Corporations are not citizens—the term applies only to natural persons—and yet they are treated as citizens within the clause of the constitution which defines the judicial power of the United States, and declares that

it shall extend to controversies between citizens of different states. "That name, indeed" (of the corporation), says Chief Justice Marshall, "cannot be an alien or a citizen, but the persons whom it represents may be the one or the other, and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals. Such has been the universal understanding on the subject." (*Bank of the United States v. Deveaux*, 5 Cranch, 61; see also the cases cited in the opinion of the chief justice.)

The fifth amendment to the constitution contains a prohibition upon the government of the United States similar to the one in the fourteenth amendment against the action of the states, declaring that no person shall be deprived of life, liberty, or property without due process of law; and it has been assumed, if not expressly held, that the provision protects the property of corporations against confiscation equally with that of individuals.

As thus seen, the question which will be presented for our determination on the trial of this case is one of the greatest importance. We express no opinion upon it, but invite for it the most thoughtful consideration of counsel. And in their discussions the control of the state over corporations of its creation, where a reserved power of amendment is embodied in their charters, or imposed by the constitution, should be considered. The general tendency of modern decisions is to treat corporations with this reserved power, as subject at all times to the will of the state as to their rights, powers, and liabilities. Such unlimited control, asserted in some cases, would, indeed, lift them not only out of the protection of the fourteenth amendment, but also out of nearly all protection, except such as the legislative pleasure of the hour may permit.

The motion to remand is denied.

Points decided.[August,

THE LAUNDRY ORDINANCE CASE.

[IN THE MATTER OF QUONG WOO.]

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

AUGUST 7, 1882.

1. **INVALID LAUNDRY ORDINANCE.**—An ordinance of the supervisors of the city and county of San Francisco declared that it should be unlawful for any person "to establish, maintain, or carry on any laundry within certain limits," which embraced more than half of the city and county, without first having obtained the consent of the board of supervisors, which should be granted only upon the recommendation of not less than twelve citizens and taxpayers in the block in which the laundry was proposed to be established, maintained, or carried on: *Held*, that the ordinance was invalid, in that it made the power vested in the supervisors depend for its exercise upon the consent of others. Their power cannot be thus delegated to others, or made dependent upon others' approval.
2. **LAUNDRIES NOT DANGEROUS.**—The business of a laundry; that is, the washing of clothing and cloths of various kinds, and ironing or pressing them in a condition to be used, is not of itself against good morals, or contrary to public order and decency; it is not offensive to the senses or disturbing to the neighborhood where conducted, nor is it dangerous to the public safety or health.
3. **CONSENT OF NEIGHBORS.**—The supervisors cannot make the prosecution of this business in particular blocks depend upon the consent of a prescribed number of citizens and taxpayers of the block. Such a restriction upon the pursuit of a lawful and inoffensive occupation is against common right, and void. The restriction might be equally applied to the pursuit of all other lawful and inoffensive occupations.
4. **BUSINESS MAY BE REGULATED.**—If the business be conducted in a manner that is offensive or dangerous, the supervisors may direct the manner to be changed, and prescribe regulations for its prosecution. If the building in which it is carried on is, by its structure, form, or material, unsafe, the supervisors may, by proper proceedings, have it altered or removed.
5. **PROHIBITORY LICENSES.**—Licenses cannot be required by the supervisors as a means of prohibiting any of the vocations of life, which are not injurious to public morals or offensive to the senses, or dangerous to the public health and safety; nor can conditions be annexed to their issue which would tend to such a prohibition.
6. **JURISDICTION—ALIENS.**—An alien between whose country and the United States there is a treaty stipulating that the citizens or subjects of his country shall have here all the rights, privileges, and immunities of the subjects of the most favored nation with which the United States have a treaty, has the right to pursue any lawful business here, and cannot be prevented from its pursuit by an invalid ordinance of the supervisors, and if arrested under it, may apply to the circuit court of the United States to be discharged.

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Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

HABEAS CORPUS. The petitioner is a subject of the emperor of China, and alleges that he is unlawfully restrained of his liberty by the chief of police of the city and county of San Francisco, in contravention of the constitution of the United States, and of the treaty between this country and China. The facts sufficiently appear in the opinion of the court.

McAllister & Bergin, and Thomas D. Riordan, for petitioner.

L. E. Pratt, district attorney of San Francisco, for respondent.

By the Court, FIELD, Circuit Justice. In May of the present year an ordinance was passed by the board of supervisors of the city and county of San Francisco, which took effect on the tenth day of June following, to regulate the establishment, maintenance, and licensing of laundries within certain designated limits, and prescribing punishment for establishing or carrying on the business of a laundry in violation of its provisions.

In its first section the ordinance declares that after its passage it shall be unlawful for any person "to establish, maintain, or carry on any laundry within that portion of the city and county of San Francisco lying and being east of Ninth and Larkin streets, without having first obtained the consent of the board of supervisors, which shall only be granted upon the recommendation of not less than twelve citizens and taxpayers in the block in which the laundry is proposed to be established, maintained, or carried on."

The second section declares that the license collector shall not issue a license to any person or persons proposing to establish, maintain, or carry on a laundry within the limits mentioned, unless he, she, or they shall first have obtained from the board of supervisors their written consent thereto, based upon the recommendation of citizens and taxpayers, as provided in the first section.

The third section makes the violation of these provisions

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a misdemeanor, upon conviction of which the party may be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding six months, or by both.

The petitioner is a subject of the emperor of China, residing in the city of San Francisco under the provisions of the treaty between that country and the United States, and alleges that he has for the last eight years been engaged in carrying on the business of a laundry within the limits of the district mentioned, and has at all times paid the license tax exacted from him under previous ordinances, and is still ready to pay any such license tax; that his license issued under said ordinances expired on the thirtieth of June last; that there now exist and have existed for years with the residents of the city and county of San Francisco, and its citizens and taxpayers, great antipathy and hatred toward the people of his race; that combinations among such residents have been formed to drive them from the country; that in consequence of this feeling it has been impossible for him to obtain the recommendation of twelve citizens and taxpayers to carry on his business in the block where he is now engaged as required by the ordinance of June 10th; and that for carrying on his business without a license issued upon such recommendation he has been arrested, and is now restrained of his liberty by the chief of police. That officer returns that he holds the petitioner under a warrant issued by a justice of the peace and acting police judge of the city and county, issued upon a charge of misdemeanor against him for violating the provisions of the ordinance in question, and accompanies his return with a copy of the warrant.

The question presented is the validity of the ordinance in requiring, for the issue of a license to "establish, maintain, or carry on" a laundry within the limits mentioned, the recommendation of twelve citizens and taxpayers in the block in which the laundry is to be "established, maintained, or carried on."

The ordinance in terms covers all laundries, whether used for the separate wants of a family or for the washing of clothes of others for hire. We shall assume, however, that

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it has reference only to laundries of the latter class. It is directed equally against those who establish them, those who maintain them, and those who carry them on. If the recommendation of any parties in the block can be required as a condition of granting the license for either of these purposes, the number is a matter of discretion with the supervisors. They may require the recommendation of double or treble the number designated; they may exact the unanimous recommendation of the citizens and taxpayers of the block. Nor need they confine the recommendation required to citizens and taxpayers; any other class may be equally designated. They may require it of some of our worthy resident aliens from Europe—gentlemen of Irish or German nativity. Indeed, if they can make the exercise of their legislative power in the granting of licenses dependent upon the approval of anybody else, they may place the approval with whomsoever they may deem best, and no one can control their action.

They have the power, by the act of April 25, 1863, "to prohibit, and suppress, or exclude from certain limits, or to regulate, all occupations, houses, places, pastimes, amusements, exhibitions, and practices, which are against good morals, contrary to public order and decency, or dangerous to the public safety." But the business of a laundry—that is, the washing of clothing and cloths of various kinds, and ironing or pressing them to a condition to be used—is not of itself against good morals, or contrary to public order or decency. It is not offensive to the senses, or disturbing to the neighborhood where conducted, nor is it dangerous to the public safety or health. It would be absurd to affirm that it is. If it be conducted in a manner that is offensive or dangerous, the supervisors may direct the manner to be changed, and prescribe regulations for its prosecution. If the building, in which it is carried on, is by its structure, form, or material unsafe, the supervisors may by proper proceedings have it altered or removed. This power the supervisors possess with reference to all vocations and the buildings in which they are prosecuted. All business must be so conducted as not to endanger the public safety

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and health. Here we are concerned only with the business of a laundry by itself; the manner, or the buildings in which it is conducted are not before us. The ordinance applies as well to a laundry in a fire-proof building, as to one in a wooden shanty. In the business of a laundry by itself, there is nothing objectionable that may not be urged against all occupations in the city and county. If, therefore, the supervisors can make its prosecution depend upon the approval of others in its neighborhood, they may require a similar approval for the prosecution of other business equally inoffensive. They may require members of the bar to close their offices against professional business unless they can secure the recommendation in their behalf of such parties in the block where the offices are, as may be designated. So, too, with bankers, merchants, traders, mechanics, journalists, publishers, printers—indeed, with all brain-workers and handworkers—the pursuit of their vocations in particular localities may be made to depend, not upon their wishes, their means, the position of their property, the facilities afforded for their business, but upon the favor or caprice of others, whose actions they cannot control by any legal proceedings. A party might not even be able to obtain a license to carry on business on his own land, provided he should possess an entire block, and it should not be occupied by others who could give the recommendation exacted. Such a restriction upon the freedom of pursuit of a lawful occupation is not authorized by any power vested in the board of supervisors; and it may be doubted whether it could be authorized by any legislative body under our form of government.)

— The supervisors are, it is true, empowered by the act of March 3, 1872, to “license and regulate all such callings, trades, and employments, as the public good may require to be licensed and regulated, and as are not prohibited by law,” but their power cannot be delegated by them to others, or its exercise made dependent upon others’ consent. The power of legislation vested in them is a public trust, which can be executed only in consonance with the general purposes of the municipality, and in subordination to the

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general laws and policy of the state. Their ordinances must be reasonable, that is, not oppressive, nor unequal, nor unjust in their operation, or they will not be upheld. Such is the well-established doctrine with respect to the legislation of municipal bodies. In *Ex parte Frank*, it was applied by the supreme court of California to an ordinance passed by the supervisors, under the act in question, exacting a license for selling goods, and fixing a different rate where the goods were within the corporate limits or *in transitu* to the city, and where the goods were without the city and not *in transitu* to it. The ordinance was held to be unjust, oppressive, unequal, and partial, and for these reasons, as well as because it was in restraint of trade between the city and the interior of the state, was adjudged to be void. The decision of the court was accompanied by some very just observations upon the limitations to the exercise of legislative power in the passage of ordinances by municipal bodies. (52 Cal. 606.)

Licenses for callings, trades, and employments may be required by the supervisors where the nature of the business demands special knowledge or qualifications on the part of the party, as in the case of dealers in drugs. They may also be required as a means of raising revenue for municipal purposes. But in neither case can they be required as a means of prohibiting any of the avocations of life, which are not injurious to public morals, nor offensive to the senses, nor dangerous to the public health and safety. Nor can conditions be annexed to their issue which would tend to such a prohibition. The exaction for any such purpose of a license to pursue a vocation of this nature, or making its issue dependent upon conditions having such a tendency, would be an abuse of authority. Such is evidently the tendency and purpose of the conditions required in the ordinance in question in this case, and we have no doubt of its invalidity for that cause.

The petitioner is an alien, and under the treaty with China is entitled to all the rights, privileges, and immunities of subjects of the most favored nation, with which this country has treaty relations. Being a resident here before

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the passage of the recent act of congress, restricting the immigration of subjects of his country, he has, under the pledge of the nation, the right to remain, and follow any of the lawful ordinary trades and pursuits of life, without let or hindrance from the state, or any of its subordinate municipal bodies, except such as may arise from the enforcement of equal and impartial laws. His liberty to follow any such occupation cannot be restrained by invalid legislation of any kind—certainly not by a municipal ordinance that has no stronger ground for its enactment than the miserable pretence that the business of a laundry, that is, of washing clothes for hire, is against good morals, or dangerous to the public safety. (R. S., sec. 753; *Ex parte Bridges*, 2 Woods, 429; *In re Quy*, 6 Saw. 237.)

It follows that the petitioner is illegally restrained of his liberty, and must, therefore, be discharged. Ordered accordingly.

JOHN CRELLIN ET AL. v. WILLIAM C. ELY AND
WASHINGTON G. ELLIOTT.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

AUGUST 21, 1882.

1. EQUITY SUIT TO RESTRAIN ACTION AT LAW—SERVICE OF PROCESS.—Where an action for the possession of real property is brought in the circuit court of the United States by plaintiffs, who are non-residents of the state and absent from it, and the defence to the action arises out of matters purely of equitable cognizance, and a suit in equity for relief against the action is brought, the court will enjoin proceedings in the action at law until the suit in equity can be heard and determined, and direct service of the subpoena in the equity suit to be made on the attorneys of the plaintiffs in the action at law.
2. SERVICE OF SUBPOENA ON ATTORNEYS.—The retainer of attorneys at law by non-residents to bring an action to recover possession of land in this state, authorizes them to appear for their clients in a suit in equity, instituted by the defendants in that action, to establish their defence; and service of the subpoena in such suit on the attorneys may be allowed by the court and held to be good service.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

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Statement of Facts.

THIS is a suit in equity for relief against an action at law commenced by the defendants against the complainants, for the possession of certain lands in the city of Oakland, in this state. Upon an affidavit of one of the complainants, that their defence to the action at law arises out of matters which are purely of equitable cognizance; that the plaintiffs therein are non-residents of the state and absent from it, and that a subpoena issued in this suit could not be served upon them by reason of such absence, an order was issued and served upon the attorneys in the action at law, to show cause why the subpoena should not be served upon them in place of the plaintiffs. Upon its return, the attorneys reply in substance, that they have only been retained to prosecute the action at law for the recovery of the lands, and do not consider themselves authorized to appear for their clients in any other proceedings.

The complaint in the action at law is in the usual form in such cases, alleging seisin of the premises and right of possession by the plaintiffs on a day designated, and the wrongful entry of the defendants thereon and their withholding of the same. It places the damages for such withholding at one hundred thousand dollars. It also asks judgment for the rents and profits of the land during the occupation of the defendants, alleging them to amount to four hundred thousand dollars. One of the plaintiffs is a citizen of New York, the other is a citizen of Michigan; both of them, as stated above, are non-residents of this state and absent from it. The defendants are either citizens of California or corporations created under its laws. They have appeared to the action and answered the complaint, denying the allegations of seisin and right of possession by the plaintiffs, and pleading in bar of the action the statute of limitations, and also title and seisin in themselves. But they assert that they cannot make their defence as to the seisin of the premises in themselves available, unless they obtain the relief prayed in their suit in equity; and that the statute of limitations will not bar a recovery, as the plaintiffs claim under a patent issued within five years upon a confirmation of a Mexican grant, which patent is deemed

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to create a new title as against parties not claiming under the same grant.

The complaint in this suit alleges in substance that in 1856 the premises for which the action at law is brought, with several other tracts of land, were owned by three parties, Edward Jones, John C. Hays, and John Caperton, being held by them as tenants in common; that during that year Jones contracted to sell his undivided interest for a valuable consideration to one Henry A. Cobb; that in pursuance of such contract of sale a conveyance, supposed at the time to embrace the premises in controversy, which constitute a block of land in the city of Oakland, was made to him, but by a mistake in the drafting of the deed the block, which in the contract of sale was designated by number 159, was omitted; that under the deed executed in the belief that it conformed to the contract and embraced the block, the purchaser, Henry A. Cobb, went into possession, and continued in possession with his co-tenants, Hays and Caperton, until some time in 1857, when he sold and conveyed his interest to one John Francis Cobb; that the latter went into possession under the conveyance, and afterwards made partition with his co-tenants, and in such partition the premises in controversy were allotted to him, and that he, or parties deriving title through him, including the complainants, have been in the possession thereof ever since and have made lasting and valuable improvements thereon, claiming all the time to own the premises; that in the year 1859 the said Jones executed in the state of New York a conveyance, in general terms, of all his property to the plaintiffs in the action at law, and they claim the premises in controversy, or some part of them, under this deed. The complainants pray that an injunction may be issued to restrain the prosecution of the action at law, and for general relief.

Cope & Boyd and W. W. Crane, for complainants.

Flournoy & Mhoon, for defendants.

By the Court, FIELD, Circuit Justice. The case presented by the bill in equity is sufficient to justify the court in directing a stay of proceedings in the action at law until the plaint-

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iffs therein appear to the suit, and until it is heard and determined. It is brought in aid of the defence to that action, and if the complainants are entitled to a correction of the deed executed to their grantor in 1856, or to a conveyance from the defendants, as purchasers with notice of their equity, it would be inequitable to preclude them from showing the fact and obtaining the relief prayed. In the state courts the complainants here could, as defendants in the action at law, set up in their answer their equitable defence and obtain a decree upon it before the trial of the issue at law. (*Arguello v. Edinger*, 10 Cal. 159; *Weber v. Marshall*, 19 Id. 447.) The plaintiffs in that action are allowed by reason of their citizenship in another state to institute their action in the circuit court of the United States, but they ought not to be permitted for that reason to deprive the defendants therein, the complainants here, of any just defence to which they are entitled under the laws of the state, although, by reason of the separate systems of law and equity in the federal courts, they are obliged to seek their relief through the more cumbersome and laborious proceeding of an independent suit.

The complainants will be allowed to serve a subpoena upon the attorneys of the plaintiffs in the action at law, and an order will be entered granting an injunction staying proceedings in that action until the hearing and determination of this suit, or the further order of the court, upon the complainants filing a bond, in the usual form in such cases, for damages, if it should be ultimately determined that they are not entitled to the relief prayed, or the suit should be dismissed—the bond to be approved in form and amount by the circuit judge.

Although the attorneys of the plaintiffs in the action at law are not specially authorized, as stated by them, to appear for the plaintiffs in any other case, their original retainer is deemed to extend to such proceedings as immediately affect the right of their clients to recover the property in controversy. The power of a court of equity to authorize substituted service in suits instituted in aid of the defense to an action at law, where the plaintiffs in such action are

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non-residents and absent from the state, is well established. Says Daniel, in his *Treatise on Chancery Pleadings and Practice*, which is a work of approved merit: "The jurisdiction is most frequently exerted where actions at law are brought by persons resident abroad to enforce demands, which, although they have, strictly speaking, a legal right to make, it is against the principles of equity to permit it. In such cases, the court will interfere by injunction served upon the attorney employed in this country to conduct the proceedings at law, to restrain the further prosecuting of such proceedings until his employer has submitted himself to the jurisdiction.

"In order to accomplish this purpose, it is permitted to the plaintiff in equity, in the first instance, to obtain an order, directing that service of the subpoena upon the attorney employed in the cause at law shall be deemed good service." (2d Am. edition, 518. See also *Burke v. Dickers*, 3 B. C. C. 23; *Stephen v. Cini*, 4 Vesey jr., 359; and *Kenworthy v. Accunor*, 3 Mad. 550.) The same doctrine is recognized in the courts of the United States. (*Hitner v. Suckley*, 2 Wash. C. C. 465; *Read v. Consequa*, Id. 174.)

Order for an injunction on the bill in equity, and for the service of a subpoena on the attorneys in the action at law, granted.

THE CASE OF THE CHINESE CABIN WAITER.

[IN THE MATTER OF AH SING.]

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

AUGUST 27, 1882.

1. CHINESE LABORERS SHIPPING ON AMERICAN VESSELS.—The act of congress of May 6, 1882, "to execute certain treaty stipulations relating to Chinese," declares that after the expiration of ninety days from its passage, and for the period of ten years, "the coming of Chinese laborers to the United States" is suspended, and that during such suspension "it shall not be lawful for any laborer to come, or having so come after the expiration of said ninety days, to remain within the United States;" and "that the master of any vessel who shall knowingly bring within the United States on such vessel, and land or permit to be

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landed, any Chinese laborer from any foreign port or place, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than five hundred dollars for each and every such Chinese laborer so brought, and also be imprisoned for a term not exceeding one year." *Held*, 1. That the prohibition upon the master of a vessel is against the bringing of any Chinese laborer embarking at a foreign port or place, and does not apply to the bringing of a laborer already on board of the vessel when it touches at a foreign port; 2. That an American vessel is deemed to be a part of the territory of the state, within which its home port is situated, and, as such, a part of the territory of the United States; and the crew of the vessel, whilst on board, are within the jurisdiction of the United States, and, if foreigners, do not lose any right of residence in the United States previously acquired under treaty with their country.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

HABEAS CORPUS. The facts sufficiently appear in the opinion of the court.

McAllister & Bergin, for petitioner.

Milton Andros, for respondent.

Philip Teare, district attorney, for collector of the port.

By the Court, FIELD, Circuit Justice. The act of congress of May 6, 1882, "to execute certain treaty stipulations relating to Chinese," declares in its first section that after the expiration of ninety days from its passage, and for the period of ten years, "the coming of Chinese laborers to the United States" is suspended, and that during such suspension "it shall not be lawful for any laborer to come, or having so come after the expiration of said ninety days, to remain within the United States."

Its second section enacts: "That the master of any vessel who shall knowingly bring within the United States on such vessel, and land or permit to be landed, any Chinese laborer from any foreign port or place, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than five hundred dollars for each and every such Chinese laborer so brought, and also be imprisoned for a term not exceeding one year."

The third section declares that these provisions shall not

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apply to Chinese laborers who were in the United States on the seventeenth of November, 1880, or who shall have come before the expiration of ninety days from the passage of the act, and who shall produce to the master of the vessel and the collector of the port certain prescribed certificates of identification, containing the name, age, occupation, last place of business, and physical marks or peculiarities of the laborer.

Section eight requires the master of a vessel arriving from any foreign port or place, at the time he delivers a manifest of the cargo, or reports the entry of his vessel, to deliver to the collector of the district a separate list of all Chinese passengers "*taken on board his vessel at any foreign port or place*, and all such passengers on board the vessel at that time."

Other sections contain various provisions to secure the enforcement and prevent the evasion of the clauses prohibiting the immigration of Chinese laborers; but they are not material to the disposition of the question presented on this application.

The petitioner is a subject of the emperor of China, and alleges that he came to California six years ago, and has since resided in the state; that for some months past he has been employed as a seaman on board the steamship *City of Sydney*, which departed from the port of San Francisco on the eighth of May last, bound on a voyage to Australia, and returned to this port on the eighth of this month; that since its return the captain has refused to allow him to land, and detains him on board in contravention of the constitution of the United States, and of the treaty between this country and China.

The captain of the steamship returns that he detains the petitioner on board of his vessel, and refuses to allow him to land by reason of the prohibitory and punitive provisions of the act of congress, which we have cited. He also sets forth all the facts connected with the employment of the petitioner, stating that he shipped on board of the steamship at the port of San Francisco on the fifth of May last as a cabin waiter; that the vessel is employed in carrying the

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mails of the United States and of certain foreign powers, as well as passengers and merchandise, between the port of San Francisco and the ports of Sydney in New South Wales, of Auckland in New Zealand, and Honolulu in the Hawaiian Islands; that he signed shipping articles binding himself to go as one of the crew on a voyage from San Francisco to Sydney and back, and went on board of the vessel in pursuance of the contract; that the vessel departed from this port on the eighth of May last, arrived at Sydney on the fourth of June, left Sydney on the thirteenth of July, and arrived at San Francisco on the eighth of this month, having touched at the ports of Auckland in New Zealand, and Honolulu in the Hawaiian Islands, the petitioner being all the time on board in his capacity as cabin waiter under his contract.

The question presented is whether the petitioner is within the class of laborers whose landing in the United States is prohibited by the act of congress. The ninety days after its passage expired on the fourth of August. The captain of the vessel is desirous of obeying the law, and is not actuated by any personal feeling in restraining the petitioner. He is also under this embarrassment: he is bound by his contract to return the petitioner to the port of shipment, and this implies that he shall land him. The detention, if unlawful, renders him liable to both civil and criminal prosecution. He therefore asks the direction of the court as to his duty; and, with the consent of his counsel, the district attorney has been heard in support of his action.

We do not, however, find any difficulty in arriving at the meaning of the act. Its provisions are plain. The master of a vessel is prohibited from bringing within the United States, and landing or permitting to be landed, any Chinese laborer *from any foreign port or place*; and that means, from bringing any Chinese laborer embarking at a foreign port or place. The prohibition does not apply to the bringing of a laborer already on board of the vessel when it touches at a foreign port. When we speak of merchandise as brought from a foreign port, the port of shipment is always understood, and not any intermediate port at which the vessel bringing the goods may have stopped. This is the common

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understanding of the terms by merchants, and is the interpretation given to them by the courts. They must be held to have the same meaning when used with reference to the importation of persons from a foreign port, as when used with reference to the importation of goods. The eighth section of the act confirms this view, if it needed any confirmation; that requires the master of the vessel to deliver a list of Chinese passengers "*taken on board* his vessel at any foreign port or place." It is the laborers thus taken on board that the master is prohibited from bringing into the United States.

Any other construction would compel a master of an American vessel, leaving a port of the United States with a Chinese seaman or waiter, to send him adrift at a foreign port, at which the vessel might touch, and prohibit the master from bringing him back in accordance with the bond which he is required by existing law to execute. (R. S., sec. 4576.)

The object of the act of congress was to prevent the further immigration of Chinese laborers to the United States, not to expel those already here. It even provides for the return of such laborers leaving for a temporary period, upon their obtaining certificates of identification. It was deemed wise policy to prevent the coming among us of a class of persons, who, by their dissimilarity of manners, habits, religion, and physical characteristics, cannot assimilate with our people, but must forever remain a distinct race, creating by their presence enmities and conflicts, disturbing to the peace and injurious to the interests of the country. But it was not thought that the few thousands now here, scattered, as they must soon be, throughout all the states, would sensibly disturb our peace or affect our civilization.

And in this connection it should not be overlooked that the petitioner, whilst on board the steamship as one of its crew, was within the jurisdiction of the United States, at all times under their protection, and amenable to their laws. An American vessel is deemed to be a part of the territory of the state within which its home port is situated, and as such a part of the territory of the United States. The

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rights of its crew are measured by the laws of its state or nation, and their contracts are enforced by its tribunals. (*Crapo v. Kelly*, 16 Wall. 610.) A foreign jurisdiction even for offenses committed by her crew on board of her in a foreign port, except where the offense is against the law of nations, does not attach unless the acts affect the peace of the port, or persons disconnected from the vessel. (Opinions of Attorney Generals, Vol. VIII, 73.) It would be, therefore, a singular circumstance in the legislation of the country, if the act of congress had been so framed that a subject of China, by his temporary employment on an American vessel sailing from an American port, was deprived of the right of residence, acquired under the treaty with his country. Only the clearest language would justify such a conclusion. Nothing in the act requires it. Whenever the United States intend to eject any person from their jurisdiction, they will undoubtedly express their purpose in plain terms.

The district attorney urges against the construction we give, that it will open the door to evasions of the law, contending that it will be impossible to prevent Chinese in a foreign port from taking the place of those shipped here, unless certificates of identification, mentioned in the act, be exacted from them. The answer to this position is, that for importing other laborers by such evasions, equally as for importing prohibited laborers without any attempt to substitute them for others, the law has provided a penalty; and it would be impossible for the master violating the law to escape detection and punishment. Independently of this consideration, the law touching the shipment of crews, requires that a list of the men shall be furnished to the collector by the master of every vessel, which shall contain substantially the same particulars of description of every one, which the act of congress exacts in the certificate of identification of the Chinese laborer, who may wish to return to the country.

But if the act of congress were defective, as we do not think it is, in providing the necessary means of identifying Chinese laborers shipping as seamen, the defect would not change the plain meaning of the sections cited.

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We are of opinion that the petitioner is not within the prohibition of the act of congress, and that his restraint by the captain of the steamship is unlawful. He must therefore be discharged.

Ordered accordingly.

THE CASE OF THE CHINESE LABORERS.

[IN THE MATTER OF AH TIE AND THIRTEEN OTHERS OF THE CREW OF THE STEAMSHIP CITY OF SYDNEY.]

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

AUGUST 29, 1882.

1. IMMIGRATION OF CHINESE LABORERS.—The prohibition upon the master of a vessel contained in the act of congress restraining the immigration of Chinese laborers, to bring within the United States from a foreign port any Chinese laborer, was intended to prevent the importation of such laborers who there embark on the vessel—and does not apply to the bringing of a Chinese laborer already on board of the vessel touching at the foreign port. The decision in the case of Ah Sing, the Chinese cabin waiter, on this point affirmed.
2. CHINESE LABORER EMPLOYED ON AMERICAN SHIP.—A Chinese laborer who has acquired the right of residence in the United States under the treaty with his country, does not lose such right by shipping on board of an American vessel, in an American port, as one of its crew for a voyage to a foreign port and back, and making such voyage under his shipping articles, though he may land at different times at such foreign port by permission of the captain, his connection with the vessel as part of the crew not being severed.
3. SAME—LANDING IN FOREIGN PORT.—The *status* of the laborer, or his relation to the vessel as one of its crew, is not changed by the fact that he is permitted by the captain to land at the foreign port for a temporary period. He is bound by his contract of shipment to return with the vessel, and the captain is bound to bring him back. To force him ashore or to abandon him there is a criminal offence, punishable by fine and imprisonment.
4. CONSTRUCTION OF STATUTES.—All laws should be so construed, if possible, as to avoid an unjust or an absurd consequence. Illustrations given.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

HABEAS CORPUS. The facts sufficiently appear in the opinion of the court.

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McAllister & Bergin, for petitioners.

Milton Andros, for respondent.

Philip Teare, district attorney, for collector of the port.

By the Court, FIELD, Circuit Justice. The petitioners are part of the crew of the American steamship *City of Sydney*. Their case is substantially like that of Ah Sing, the Chinese cabin waiter of the same vessel, recently before us on *habeas corpus*. It differs in only one particular. Like him, they are Chinese, and like him they shipped on board of the steamship on the fifth of May last, signing at the time articles binding themselves to go as part of its crew on a voyage from San Francisco to Sydney and back. One of the petitioners served on board as a scullion, the others as waiters or pantrymen. The vessel departed from this port on the eighth of May, arrived at Sydney on the fourth of June, left Sydney on the fourteenth of July, and arrived here on the eighth instant, having touched at the ports of Auckland in New Zealand, and Honolulu in the Hawaiian Islands. At Sydney the petitioners on several occasions, by the written permission of the captain, went on shore and remained a few hours, without, however, severing or intending to sever their connection with the vessel as part of its crew. This fact is the only one distinguishing this case from that of Ah Sing. We there held that the prohibition upon the master of a vessel, contained in the act of congress, to bring within the United States from a foreign port any Chinese laborer, was intended to prevent the importation of such laborers who there embark on the vessel—and does not apply to his bringing a Chinese laborer already on board of his vessel touching at the foreign port. We also held that whilst on board the American vessel, the laborer is within the jurisdiction of the United States, and does not lose, by his employment, the right of residence here previously acquired under the treaty with his country.

The *status* of the petitioners, and their relation to the vessel, were not changed in any respect by the fact that they were permitted by the captain to land for a few hours at the

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port of Sydney. They were bound, by their contract of shipment, to return with the vessel; and the captain was bound to bring them back. He could not have forced them ashore in a foreign port; nor could he have abandoned them there. Had he done either of these things, he would have rendered himself liable to criminal prosecution. An act of congress, passed more than half a century ago, and reenacted in the revised statutes, declares that, "every master or commander of any vessel belonging in whole or in part to any citizen of the United States, who, during his being abroad, maliciously and without justifiable cause, forces any officer or mariner of such vessel on shore in order to leave him behind in any foreign port or place, or refuses to bring home again, all such officers and mariners of such vessel whom he carried out with him, as are in a condition to return and willing to return, when he is ready to proceed on his homeward voyage, shall be punished" by fine and imprisonment. The fine may extend to five hundred dollars, and the imprisonment to six months. (R. S., sec. 5363.) The terms "officers and mariners" here used apply to all persons, other than the captain, employed under shipping articles on the vessel in any capacity. In *United States v. Coffin* (1 Sumn. 394), Judge Story was called upon to construe this act, and he held that the "home" referred to was not the home of any seaman, native or foreign, but the home port of the ship for the voyage.

In another case (*Matthews v. Offley*, 3 Sumn. 125), the same distinguished judge had occasion to consider the circumstances under which a foreign seaman, who had acquired a residence in the United States, and had been engaged in the merchant service, could be deemed to have abandoned that service so as to justify the captain of another vessel in refusing to bring him home from a foreign port as a destitute seaman by direction of the consul; and the judge said, that some overt act on the seaman's part, such as engaging in a foreign service, or resuming his original native character, or disowning his American character and domicile, seemed indispensable to rebut the presumption that he still attached himself to the American service.

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Something equally indicative of an intention on the part of a Chinese laborer, who had shipped on an American vessel as one of its crew in an American port, to abandon the service of the ship and his residence in the United States, would seem to be necessary to justify the master in refusing to bring him back. The law of congress as to the duty of the master in this particular, has not been, in terms, repealed by the act restraining the immigration of Chinese laborers, and the purpose of the latter act does not require us to hold that the former is repealed by implication. A Chinese laborer on an American vessel cannot be held to lose his residence here, so as to come within the purview of the act, by such temporary entry upon a foreign country as may be caused by the arrival of the vessel on her outward voyage at her port of destination, or her touching at any intermediate port in going or returning, or her putting into a foreign port in stress of weather. And we should hesitate to say that it would be lost by the laborer passing through a foreign country in going to different parts of the United States by any of the direct routes, though we are told by the counsel of the respondent, that a Chinese laborer having taken a ticket by the overland railroad from this place to New York, by the Central Michigan route, which passes from Detroit to Niagara Falls through Canada, was stopped at Niagara and sent back, as within the prohibition of the act of congress; and on attempting to retrace his steps, was again stopped at Detroit. A construction which would justify such a proceeding cannot fail to bring odium upon the act, and invite efforts for its repeal. The wisdom of its enactment will be better vindicated by a construction less repellent to our sense of justice and right.

All laws should be so construed, if possible, as to avoid an unjust or an absurd conclusion. "General terms," said the supreme court, in a case before it, "should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its let-

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ter." (*United States v. Kirby*, 7 Wall. 482.) So the judges of England construed the law which enacted that a prisoner breaking prison should be deemed guilty of a felony, holding that it did not apply to one breaking out when the prison was on fire, observing that the prisoner was "not to be hanged because he would not stay to be burnt." And in illustration of this doctrine, the construction given to the Bolognian law against drawing blood in the street, is often cited. That law enacted that whoever thus drew blood should be punished with the utmost severity, but the courts held that it did not extend to the surgeon who opened the vein of a person falling down in the street in a fit. The application sought to be made of that law to the surgeon was hardly less absurd than some of the applications, which, without much reflection, are sought to be made of the act of congress.

The petitioners must be discharged.

Ordered accordingly.

THE CASE OF THE CHINESE MERCHANT.

[IN THE MATTER OF LOW YAM CHOW ON HABEAS CORPUS.]

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 5, 1882.

1. CHINESE TREATY, 1880—ACT OF CONGRESS, 1882—CHINESE LABORERS AND MERCHANTS.—The first article of the treaty with China of November 17, 1880, provides that, "Whenever, in the opinion of the government of the United States, the coming of *Chinese laborers* to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it," declaring at the same time that "the limitation or suspension shall be reasonable, and shall apply *only to Chinese who may go to the United States as laborers, other classes not being included in the limitations.*" The second article further declares that "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body or household servants, and Chinese laborers who are now in the United States, shall be allowed to come and go of their own free will and accord, and shall be accorded

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all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." The act of congress of May 6, 1882, passed pursuant to the authority of this treaty, suspends the coming of *Chinese laborers* to the United States for ten years, and prohibits the masters of vessels from bringing them from any foreign port, but excepts those who were here previously to November 17, 1880, or who may come before the expiration of ninety days from the passage of the act, and who shall produce certain prescribed certificates of identification. The sixth section of the act provides, that in order to the faithful execution of the provisions forbidding the coming of Chinese laborers, any other Chinese person entitled to come to the United States shall be identified by a certificate of the Chinese government, stating among other things his former and present occupation, and *place of residence in China*: *Held*, 1. That the certificate of the government required for others than laborers coming to the United States from China was intended to facilitate proof of their not being within the prohibited class, and not as a means of restricting their coming; 2. That the certificate is not required from merchants and others not laborers domiciled out of China when the act of congress was passed, and coming from the foreign jurisdiction; and 3. Proof of the occupation of such persons may be made by parol.

2. STATUTORY CONSTRUCTION.—The language of the act of congress should be construed, if possible, in harmony with the objects of the treaty. It will not be inferred that congress intended to disregard its stipulations.

Before FIELD, Circuit Justice, and HOFFMAN, District Judge.

HABEAS CORPUS. The facts sufficiently appear in the opinion of the court.

McAllister & Bergin, for petitioner.

Milton Andros, for respondent.

Philip Teare, district attorney, for collector of port.

By the Court, FIELD, Circuit Justice. The petitioner is a subject of the Emperor of China, and alleges that he is restrained of his liberty on board of the American steamship *City of Rio de Janeiro*, in the port of San Francisco, by its captain, in contravention of the constitution and the treaty between the United States and his country. He states in his petition in substance as follows: that he is a Chinese merchant by occupation, and not a Chinese laborer; that he was such merchant in Peru for about ten years; that upon the breaking out of the war between that country and Chile,

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he left Peru and established himself at Panama, in the republic of New Granada; that for the last five years he has also been a member of the firm of Chow Kee & Co., merchants in San Francisco; that on the thirty-first day of July last he took passage at Panama on the steamship which arrived at the port of San Francisco on the seventeenth of August, and that its captain refuses to allow him to land, but detains him on board of the vessel under the claim that his landing in the United States is prohibited by the act of congress of May 6, 1882, "to execute certain treaty stipulations relating to Chinese;" that such claim is unfounded; that the petitioner has been a merchant by occupation for the last twelve years, and has never been a laborer within the meaning of the treaty. He therefore prays that a writ of *habeas corpus* be issued to the captain to produce him, and that he be discharged from his arrest. The writ being issued, the captain makes a return admitting the detention of the petitioner and justifying it under the act of congress.

On the hearing, proof was received against the objection of counsel, of the truth of the petitioner's averment, that he is a merchant by occupation, and has been such for years either in Peru or at Panama. No attempt to impeach this evidence was made.

Two questions are thus presented for determination: 1. Whether Chinese merchants, who resided, on the passage of the act of congress, in other countries than China, on arriving on a vessel in a port of the United States, are required to produce certificates of the Chinese government establishing their character as merchants, as a condition of their being allowed to land; 2. Whether their character as such merchants can be established by parol proof. For a correct solution of these questions some reference must be had to the treaties between China and this country: In the fifth article of the one concluded in July, 1868, generally known as "the Burlingame treaty," the contracting parties declare that "they recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one coun-

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try to the other, for purposes of curiosity, of trade, or as permanent residents." In its sixth article they declare that "citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation, and reciprocally Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may be enjoyed by the citizens or subjects of the most favored nation."

Whilst these articles remained in full force no legislation by congress looking to a suspension of, or restriction upon the immigration of Chinese, engaged in any lawful occupation, was possible without a breach of faith towards China. And yet it was discovered that the physical characteristics and habits of the Chinese prevented their assimilation with our people. Conflicts between them and our people, disturbing to the peace of the country, followed as a matter of course, and were of frequent occurrence. Chinese laborers, including in that designation not merely those engaged in manual labor, but those skilled in some art or trade, in a special manner interfered in many ways with the industries and business of this state. Their frugal habits, the absence of families, their ability to live in narrow quarters without apparent injury to health, their contentment with small gains and the simplest fare, gave them great advantages in the struggle with our laborers and mechanics, who always and properly seek something more from their labors than sufficient for a bare livelihood; and must have and should have something for the comforts of a home and the education of their children. A restriction upon the immigration of such laborers was, therefore, felt throughout this state to be necessary, if we would prevent the degradation of labor and preserve all the benefits of our civilization. Through the urgent and constantly repeated appeals from the Pacific coast, the government of the United States was induced to make application to the government of China for a modification of the treaty of 1868; and the supplementary treaty of November, 1880, was the result. The

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first article of this treaty provides, that "Whenever in the opinion of the government of the United States the coming of *Chinese laborers* to the United States, or their residence therein, affects or threatens to affect the interests of that country or to endanger the good order of the said country or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it," declaring at the same time that "the limitation or suspension shall be reasonable, and shall *apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations.*" The second article further declares that "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body or household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

The act of May 6, 1882, was framed in supposed conformity with the provisions of this supplementary treaty. In the inhibitions which it imposes upon the immigration of Chinese, there is no purpose expressed in terms to go beyond the limitations prescribed by the treaty. And we will not assume, in the absence of plain language to the contrary, that congress intended to disregard the obligations of the original treaty of 1868, which remains in full force except as modified by the supplementary treaty of 1880. This latter treaty only authorizes suspensive or restrictive legislation with respect to the importation of Chinese laborers. It provides in express terms, as seen above, that the limitation or suspension shall apply only to them, "*other classes not being included in the limitations.*"

The act of congress declares in its first section that after the expiration of ninety days from its passage, and for the period of ten years, "the coming of *Chinese laborers* to the United States" is suspended, and that during such suspen-

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sion "it shall not be lawful for any *laborer* to come, or, having so come after the expiration of said ninety days, to remain within the United States." And its second section makes it a misdemeanor, punishable by fine and imprisonment, for the master of any vessel to knowingly bring within the United States on such vessel and land or permit to be landed any *Chinese laborer* from any foreign port or place.

The third section excepts from these provisions Chinese laborers who were in the United States on the seventeenth of November, 1880, or who shall have come before the expiration of ninety days from the passage of the act, and shall produce to the master of the vessel and the collector of the port certain prescribed certificates of identification, containing the name, age, occupation, last place of business, and physical marks or peculiarities of the laborer.

The act, conforming to the supplementary treaty, is aimed against the immigration of *Chinese laborers*—not others. The sixth section, which is supposed to cover the present case, was not intended to prohibit the coming to the United States of other classes of persons, but to prevent, by a prescribed mode of proof, the evasion of the prohibition against the coming of laborers. Its language is as follows: "That in order to the faithful execution of articles one and two of the treaty in this act before mentioned, every Chinese person other than a laborer, who may be entitled by said treaty and this act to come within the United States, and who shall be about to come to the United States, shall be identified as so entitled by the Chinese government in such case, such identity to be evidenced by a certificate issued under the authority of said government, which certificate shall be in the English language, or (if not in the English language) accompanied by a translation into English, stating such right to come, and which certificate shall state the name, title, or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, and *place of residence in China* of the person to whom the certificate is issued, and that such person is entitled, conformably to the treaty in this act

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mentioned, to come within the United States. Such certificate shall be *prima facie* evidence of the facts set forth therein, and shall be produced to the collector of customs, or his deputy, of the port in the district of the United States, at which the person named therein shall arrive."

The certificate mentioned in this section is evidently designed to facilitate proof by Chinese other than laborers coming from China and desiring to enter the United States, that they are not within the prohibited class. It is not required as a means of restricting their coming. To hold that such was its object would be to impute to congress a purpose to disregard the stipulation of the second article of the new treaty, that they should be "allowed to go and come of their own free will and accord." Nor is it required, as a means of proving their character, from merchants and others not laborers domiciled out of China when the law was passed, and coming here from such foreign jurisdiction. The particulars, which the certificate must contain, show that it was to be given to those then residing there, for their *place of residence in China* is to be stated. Independently of this consideration, that government could not be expected to give, in its certificate, the particulars mentioned of persons resident—some perhaps for many years—out of its jurisdiction. Neither the letter nor the spirit of the act calls for a construction imputing to congress the exaction of a condition so unreasonable. The general language of the twelfth section, "That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs, the certificate required in the act, of Chinese persons seeking to land from a vessel," is to be construed as applying to such persons as are by previous sections prohibited from coming, not as extending the prohibition.

We repeat what we said in the case of Ah Tie and other Chinese laborers; that all laws are to be so construed as to avoid an unjust or an absurd conclusion; and general terms are to be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. In addition to the illustrations of this rule there given, we may refer to

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two instances furnished by the decisions of the supreme court. A law of congress declares that whoever wilfully obstructs or retards the carrier of the mails of the United States, shall be deemed guilty of a public offence and be punished by a fine. A mail carrier in Kentucky was arrested by the sheriff upon a charge of murder, and for the arrest the sheriff was indicted. The supreme court held that the general language of the act of congress was not to be construed to extend to the case; for it could not be supposed that congress intended to interfere with the enforcement of the criminal laws of the state, in its legislation to prevent unnecessary obstruction in the carriage of the mails. It would have been absurd to hold that in order to secure the speedy transportation of the mails, immunity from punishment for crime was given to the mail carrier.) (*U. S. v. Kirby*, 7 Wall. 482.)

So the act of congress for the recovery of the proceeds of captured and abandoned property during the late war required the claimant in the court of claims to prove that he had never given aid or comfort to the rebellion, yet the supreme court held, that one who had been pardoned by the president was relieved from this requirement. The general language of the act covered his case, but as the pardon in legal effect blotted out the guilt of the offender, that is, closed the eyes of the court so that it could not be considered as an element in the determination of his case, the pardon was deemed to take the place of the proof and relieved him from the necessity of establishing his loyalty. "It is not to be supposed," said the supreme court, "that congress intended, by the language of the act, to encroach upon any of the prerogatives of the president, and especially that benign prerogative of mercy which lies in the pardoning power. It is more reasonable to conclude that claimants restored to their rights of property by the pardon of the president were not in contemplation of congress in passing the act, and were not intended to be embraced by the requirement in question. All general terms in statutes should be limited in their application so as not to lead to injustice, oppression, or any unconstitutional operation, if

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that be possible. It will be presumed that exceptions were intended which would avoid results of that nature." (*Carlisle v. United States*, 16 Wall. 153.)

These cases would be sufficient to justify us in giving a construction to the act under consideration in harmony with the supplementary treaty, even were the general terms used susceptible of a larger meaning. Its purpose will be held to be, what the treaty authorized, to put a restriction upon the emigration of laborers, including those skilled in any trade or art, and not to interfere, by excluding Chinese merchants, or putting unnecessary and embarrassing restrictions upon their coming, with the commercial relations between China and this country. Commerce with China is of the greatest value, and is constantly increasing.* And it should require something stronger than vague inferences to justify a construction which would not be in harmony with that treaty, and which would tend to lessen that commerce. It would seem, however, from reports of the action of certain officers of the government—possessed of more zeal than knowledge—that it is their purpose to bring this about, and thus make the act as odious as possible.

We are of opinion that the section requiring a certificate for Chinese merchants coming to the United States does not apply to those who resided out of China on the passage of the act of congress, and that proof of their occupation may be made by parol.

It follows that the petitioner must be discharged, and it is so ordered.

CONCURRING OPINION.

HOFFMAN, J. The petitioner alleges that he is unlawfully restrained of his liberty in contravention of the constitution of the United States, and of the treaty between the United

* According to the statement furnished by the Chinese consul, the value of exports to China from the United States, and from China to the United States, for the year in which the Burlingame treaty was concluded (1868), amounted to \$15,365,013, and for the fiscal year ending June 30, 1881, amounted to \$27,765,409, almost doubling our commerce in thirteen years. Of this latter amount \$16,185,165 of the merchandise passed through the port of San Francisco; and 70 per cent. of it was shipped by Chinese merchants. When the Burlingame treaty was concluded, the export of flour from California at the port of San Francisco amounted to about 20,000 barrels a year. The export of this article has steadily increased since, until in the last year (1881) it amounted to 271,118 barrels, 90 per cent. of which was shipped by Chinese merchants.

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States and the empire of China; commonly known as the Burlingame treaty; that he is a Chinese merchant, and not a Chinese laborer; that he was a Chinese merchant at Peru for about ten years, and that thereafter, upon the outbreak of war between Chile and Peru, he left the latter country and established himself as a merchant at Panama, in the republic of New Granada, where he still resides. That for the last five years he has been a member of the firm of Kwong Sing Lung, Chow Kee & Co., merchants, in this city.

That on the thirty-first day of July, 1882, he took passage at Panama on board the American steamship *Rio de Janeiro*, and arrived at this port on the said steamship on the seventeenth day of August, 1882, but that he is unlawfully restrained of his liberty and not allowed to land by the master of said steamer upon the claim that under provisions of the act of May 6, 1882, entitled "An act to execute certain treaty stipulations relating to Chinese," he has no right to land.

The return of the master of the steamer admits the allegations of the petition as to the embarkation of this petitioner at Panama and his arrival at this port, but disavows all knowledge or information sufficient to enable him to admit or deny the allegation of this petitioner that he is a Chinese merchant and not a Chinese laborer.

But he claims that the petitioner cannot lawfully land in the United States by reason of the non-production by him to the collector of the certificate of identification, etc., by said act of May 6, 1882, required to be produced by every Chinese person other than a laborer arriving in the United States.

On the hearing, the truth of the allegations of the petition was established beyond doubt or controversy. It appeared that the petitioner is, as he claims to be, a Chinese merchant residing in Panama; that the firm in this city, of which he is member, is largely engaged in commerce, and that his object in visiting San Francisco was to make purchases for his establishment at Panama, and to adjust his accounts with his partners in this city. The proofs offered

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by petitioner were corroborated by his dress, appearance, and manners. He evidently did not belong to the class of Chinese laborers or coolies which the treaty and the act of congress intended to exclude; but, on the contrary, he belongs to a class which, by the express terms of article II of the treaty, are allowed to go and come "of their own free will and accord," and to enjoy "all the rights, privileges, immunities, and exemptions accorded to the citizens and subjects of the most favored nation."

But it is strenuously urged by the district attorney, that under the provisions of the sixth section of this act, no evidence is admissible to prove the petitioner not to belong to the prohibited class, except the production of the certificate of identification therein required, and that the failure to produce such a certificate raises a conclusive presumption that the person so failing to produce it is a Chinese laborer.

He even contends that an indictment against the master for landing, or permitting to land, a Chinese laborer would be sustained by proof, that the person so landed did not produce to the collector the certificate of identification required by section 6.

The argument chiefly pressed by the district attorney in support of this construction was, that to admit-parol evidence as to the character of the immigrant would open the door to endless evasions of the act, and that any Chinese laborer could procure any number of witnesses who would swear him to be a merchant, student, teacher, or traveller from curiosity, and that this testimony the United States would rarely be able to controvert.

The suggestion is not without force, though the danger is, I think, exaggerated. It would not be easy, in all cases, for a Chinese laborer or coolie, whom alone it was the intention of the act to exclude, to simulate the dress, manners, and general appearance and bearing of the merchant, student, teacher, or traveller, who, in China almost as much as in India, are separated from the common laboring classes by social and external differences which almost amount to a distinction of caste.

But even if the apprehensions of the district attorney

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were well founded, the construction he contends for would be inadequate to prevent the evil, unless we also hold, that on an indictment against the master or a libel against the ship, the non-production of the certificate shall be conclusive evidence that the passenger landed is a laborer. For if the master or the claimant of the vessel be allowed to show his true character by parol, the door would be opened to all the evasions of the law which the district attorney fears.

Section 6 is as follows: "That in order to the faithful execution of articles 1 and 2 of the treaty in this act before mentioned, every *Chinese person* other than a laborer who may be entitled by said treaty and this act to come within the United States and who shall be about to come to the United States, shall be identified as so entitled by the Chinese government in each case, such identity to be evidenced by a certificate issued under the authority of said government, which certificate shall be in the English language, or (if not in the English language) accompanied by a translation into English, stating such right to come, and which certificate shall state the name, title, or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, and *place of residence in China* of the person to whom the certificate is issued, and that such person is entitled conformably to the treaty in this act mentioned to come within the United States. Such certificate shall be *prima facie* evidence of the fact set forth therein, and shall be produced to the collector of customs or his deputy, of the port in the district of the United States at which the person named therein shall arrive."

It will be observed that the terms of this section lend no support to the position taken by the district attorney. A certificate of identification is, it is true, required to be produced to the collector, but it is not provided that the Chinese person failing to produce it shall not be allowed to land—much less that the certificate shall be the only proof of the right of the passenger to come within the United States, and that in its absence he shall be conclusively pre-

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sumed to be a Chinese laborer, and that this presumption exists even in a criminal proceeding against the master for "landing or permitting to land a Chinese laborer."

In the debates in the senate on the original bill which contained provisions nearly identical with those of section 6, in the bill which obtained the president's approval, it was strenuously urged that to exact a compliance with "the cumbersome and burdensome provisions" with regard to certificates of identification, and which are required of the subjects of no other power, was a violation of the treaty which allows the permitted classes to go and come of their own free will and accord, and which guarantees to them all the rights, privileges, immunities, and exemptions accorded to the citizens and subjects of the most favored nation. To this it was replied that the provisions in the bill were merely for purposes of identification; that they were in the interest of the classes permitted to come; that it was no hardship to the permitted classes to leave it to the Chinese government to say who are merchants, traders, teachers, etc., and therefore not within the excluded class.

But if the bill had declared, or had been supposed to declare, by necessary implication, that no Chinese person, unprovided with a certificate, should, under any circumstances, be allowed to land, and that its *non-production* should be conclusive evidence that the passenger was a Chinese laborer, while its *production* should only be *prima facie* evidence of the facts set forth therein, the bill might have encountered an opposition which would have endangered its passage.

The circumstances of the case before us do not require a definitive decision of the question whether a Chinese merchant, teacher, etc., arriving from China, and failing to produce the certificate required by section 6, might not overcome by satisfactory evidence of his real character the presumption that he is a laborer, raised by the absence of the certificate, and establish the right secured by the treaty to go and come of his own free will and accord.

The petitioner has been for many years a resident of this city, of Callao, and latterly of Panama. He comes to the

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United States on a temporary visit for purposes of trade. At the time of his embarkation on board an American vessel at Panama, the law which requires the production of a certificate had not gone into effect.

By referring to the terms of section 6, which have been cited, it will, we think, be apparent that the persons contemplated in its provisions are Chinese merchants, etc., coming from *China* to the United States, and not Chinese merchants coming to this country from other parts of the world.

The certificate is to be furnished by the Chinese government, or under its authority. It must state the name, age, height, and all physical peculiarities, former and present occupation, and *place of residence in China*, of the person to whom it is issued.

How could a Chinese merchant who has resided, it may be for ten or twenty or thirty years, in London, or Calcutta, or Callao, or Panama, obtain such a certificate?

Certainly not without going to China for the purpose. And how if he should revisit his country with that object, could the certificate state, as required, his place of residence in China?

The evil which the treaty and the law were intended to remedy, was the unrestricted immigration from the teeming population of China of laborers, whose presence here in overwhelming numbers was felt by almost all thoughtful persons to bear with great severity upon our laboring classes, and to menace our interests, our safety, and even our civilization.

But while anxious to attain this end, an equal solicitude was felt to adopt no legislation which should violate the plighted faith of the nation, unnecessarily give offense to the Chinese government, or hinder or impede our large and growing commerce with China.

Congress may therefore reasonably be supposed to have thought that the great object of the bill would be sufficiently attained by exacting certificates of identification from Chinese emigrants from China, from whence the great influx of laborers was feared, and from whence it chiefly comes. And

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it may have advisedly refrained from imposing the same requirement upon Chinese merchants, etc., residents in other countries, a requirement which it would be almost impossible for them to fulfil; nor can we suppose that the Chinese government would regard such an exaction, which practically excludes all their subjects residing abroad from coming to the United States, as a reasonable or even honest compliance with the treaty stipulation, which guarantees to Chinese merchants, etc., the right to come and go of their own free will and accord.

In the case before us, not only was it impossible for the petitioner to obtain the certificate required, but at the time he embarked on board an American ship at Panama, no law was in operation requiring him to do so. If he is not permitted to land it will not be because he has no right to do so, under the treaty, for he has clearly and indisputably shown that he does not belong to the excluded class—but because he does not produce evidence which it was impossible for him to procure, and which when, by embarking on board an American ship, he came under our flag and within our jurisdiction, he was not required by any law then in effect to obtain.

We are clearly of opinion that the case is not within the provisions of the sixth section of the act.

Some further observations may not be inappropriate.

It is well known that the law under consideration encountered wide-spread and vehement opposition. It was attacked as the servile echo of the clamors of the sand lot; as fraught with danger to our commercial relations with China; as inconsistent with our national policy; as obstructing the spread of Christianity, and as violative not only of the treaty, but of the inherent rights of man.

It was defended as absolutely indispensable to the preservation of our social and political system, and even to our safety. Nothing would more gratify the enemies of the bill than that in its practical operation it should be found to be unreasonable, unjust, and oppressive. If Chinese merchants coming here from all parts of the world are excluded because they fail to produce a certificate impossible for

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them to obtain; if a merchant long resident here and on his way to New York by a route which for a short distance passes through Canada, is to be stopped at Niagara bridge for want of a certificate, and on retracing his steps is to be stopped at Detroit on a similar pretext, and on the ground that in each case he is to be regarded as coming to the United States from a foreign country, within the true intent and meaning of the treaty and the law; if a Chinese merchant similarly resident in this city and desirous of temporarily visiting British Columbia or Mexico is to be refused, as it seems he must be, a certificate by the custom-house authorities, under section 4, on the ground that he is not a laborer, and on his return, after a few weeks' absence, is to be prohibited from landing on the ground that he has no certificate of identification issued by the Chinese government under section 6; if, in these and similar cases, the operation of the law is found to work manifest injustice, oppression, and absurdity, its repeal cannot long be averted.

I am satisfied that the friends of the law do it the best service by giving to it a reasonable and just construction, conformable to its spirit and intent and the solemn pledges of the treaty, and not one calculated to bring it into odium and disrepute.

IN RE DILLON, CONSUL OF FRANCE.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

APRIL 27, 1854.

1. **CONSULS NOT AMENABLE TO SUBPENA.**—The provision of the constitution, which secures to the accused in criminal prosecutions the right to have compulsory process for obtaining witnesses in his favor, does not authorize the issuing of such process to ambassadors, who by public law, or consuls, who by express treaty, are not amenable to the process of the courts.
2. **SUBPENA DUCES TECUM—OFFICIAL DOCUMENTS.**—Where a subpoena *duces tecum*, directed to a consul of France, is prayed for, it is the duty of the court to require the party praying for it to show that the document is not an official paper, protected by law from examination and seizure.

Before HOFFMAN, District Judge.

THE facts appear in the opinion of the court.

S. W. Inge, United States attorney.

C. Temple Emmett, attorney for Del Valle.

HOFFMAN, J. In this case the counsel of Señor Del Valle, a defendant now on trial on an indictment found against him in this court, obtained a subpoena *duces tecum*, directed to P. Dillon, commanding him to appear in court and produce a document said to be in his possession, and deemed material for the defence of the accused. The subpoena was returned served, but no return was made to the subpoena by M. Dillon, stating his consular privileges or other exemption from the process of the court. The witness having failed to appear, an attachment to compel his appearance was moved for and obtained. On being brought into court, M. Dillon, who is the consul of France at this port, protested against the compulsory process which had been issued, and while he disavowed any disrespect to the court, he claimed the immunity from compulsory process, requiring him to appear as a witness, secured to the consuls of France and America, by the second article of the convention ratified April 1, 1853. He was informed by the court that it was ready to hear the question whether the provisions of the convention applied to the present case fully discussed; the argument was fixed for the succeeding day, and M. Dillon discharged. The discussion that has since taken place, would perhaps more regularly have arisen on the return of the process, or on that of a rule to show cause why an attachment should not issue. The counsel of M. Dillon were invited, however, by the court, to argue the subject as fully as if on motion for an attachment; and the whole question has been ably and elaborately discussed by him as well as by the counsel for the defendant on the trial.

The question presented to the court is, whether it has the power, on the motion of the defendant, accused of a crime against the laws of the United States, to issue and enforce compulsory process to the consul of France, requiring him

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to appear in court and testify in behalf of the defendant, notwithstanding the provisions of the article of the convention, before cited.

By the terms of that article, it is stipulated between the United States and France that their consuls shall never be compelled to appear in court as witnesses. They may, however, be invited to attend, and if unable to do so, the article provides, that they may be examined orally at their houses, or their depositions taken.

By the sixth amendment to the constitution of the United States, it is provided that the accused in all criminal prosecutions shall enjoy the right to have compulsory process for obtaining witnesses in his favor.

It is urged by the counsel for the accused that this right is sacred, and secured to him by the constitution of the United States; that it is comprehensive and without exception, and that neither by law nor treaty can he be deprived of the right of compelling the attendance of any person whose testimony may be material to his defence.

It was admitted by the counsel of M. Dillon, that if the constitution secures to the accused this right in the present case, he cannot be deprived of it by any treaty stipulation; and that if the court is called upon to choose between allowing a constitutional right to a prisoner and disregarding a treaty stipulation, or denying the constitutional right and respecting the treaty, its highest allegiance is due to the constitution, and the rights therein guaranteed must be maintained.

The question then to be determined is: Is the treaty stipulation alluded to irreconcilably in conflict with the constitutional provision cited?

In approaching the consideration of this question, it is impossible for the court not to be profoundly impressed with a sense of its importance—not merely abstractly, but on account of consequences its decision may involve. On the one hand, it is asked to deny the accused a right claimed to be secured under the fundamental law of the land. On the other, it is urged not merely to hold a law of congress void for unconstitutionality—a duty at all times the most

delicate and important an American court of justice is called upon to perform—but to declare a solemn treaty stipulation, entered into between the United States and a foreign country, to the faithful observance of which the honor of the nation is pledged, inoperative and void, because those by whom it was made had no power to enter into such engagements.

By the constitutional provision referred to, the accused has the right to compulsory process to obtain witnesses in his favor.

Does, then, this provision extend to every person within our territory, whether or not he be an ambassador or other public minister, and whether or not he be, by treaty stipulation or express law, exempted from the duty of obedience to a subpoena? And can the court, on his disobeying the writ, compel his obedience by fine and imprisonment?

If the accused, by virtue of the constitutional provision in this case, can compel the attendance of the consul of France, it seems necessarily to follow that the attendance of an ambassador could in like manner be enforced.

The immunity afforded to, and personal inviolability of ambassadors now universally recognized by the laws of nations, has been deemed one of the most striking instances of the advance of civilization and the progress of enlightened and liberal ideas. Though resident in a foreign country, they are, says Mr. Chancellor Kent, exempted absolutely from all allegiance and from all responsibility to the laws of the country to which they are deputed. (1 Kent's Com. 45.) Their persons have, by the consent of all nations, been deemed inviolable; nor can they, says the same high authority, be made amenable to the civil or criminal jurisdiction of the country. By fiction of law the ambassador is considered as if he were out of the territory of the foreign power, and, though he resides within the foreign state, he is considered a member of his own country, retaining his original domicile, and the government he represents has exclusive cognizance of his conduct and ~~control~~ control over his person. (1 Kent's Com. 46.) Does, then, constitution of the United States, by the provision in

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favor of persons accused of crime, intend to subject these high functionaries to the process of the courts, and does it authorize and require the courts, in case of disobedience, to violate their persons and disregard immunities universally conceded to them by the laws of nations, by imprisoning them? If, as is the received doctrine, the ambassador cannot, even in the case of a high crime committed by himself, be proceeded against, it is obvious that for a lesser offence of a contempt or disobedience to an order of a court, he would *a fortiori* not be amenable to the law. The only ground upon which the right of a court to compel the appearance of an ambassador by its process, and to punish him if he disobey it, can be placed, is that the constitution is, in this case, in conflict with and paramount to the laws of nations, and the immunity usually conceded to ambassadors is by the provision in favor of the accused in criminal cases taken away.

But the privilege of ambassadors from arrest, under any circumstances, has been declared by congress by special legislation. By the twenty-fifth section of the act of congress of April 30, 1790, it is enacted that "if any writ or process sued out of any of the courts of the United States, or of a particular state, or by any judge or justice therein respectively, whereby the person of an ambassador may be arrested or imprisoned, or his goods distrained, seized, or attached, such writ and process shall be deemed and adjudged to be utterly null and void to all intents, construction, and purposes whatever."

Under this act it is apparent that no attachment can issue against an ambassador, whether to compel his appearance as a witness, or for any other purpose.

But if the construction of the constitutional provision contended for by the accused, be sound, this enactment must be disregarded, and the ambassador, like any other person, must be attached.

It is clear that the framers of the enactment above cited had no idea that in exempting ambassadors from all process against their persons, they were depriving parties accused of a right to compulsory process to obtain the attendance of

witnesses, secured to them by the constitution. One of two things is evident: either that the constitutional provision has a less comprehensive operation than is claimed for it, or that this enactment, prohibiting any process for the arrest of an ambassador, in any case, is unconstitutional.

The legislative interpretation of the constitutional provision is the more significant, as the framers of that act must have had their attention particularly directed to that provision, for by the twenty-ninth section the right of the accused to compel the attendance of his witnesses, is expressly declared, and placed upon a constitutional basis.

If, then, the provision of the constitution does not authorize the courts to compel the attendance of ambassadors, because they are exempt from their jurisdiction on general principles of public law, a law which derives its authority from the supposed assent of all civilized nations, a like exception must exist in favor of other public agents, on whom a nation has expressly and by solemn treaty agreed to confer a similar exemption.

What, then, is the operation and effect of the constitutional provision referred to? In determining this question, its nature and object, and the evil it was intended to remedy, must be considered.

By the ancient rules of the common law, the party accused in capital cases had no right to exculpate himself by the testimony of any witnesses. The injustice of so unreasonable and oppressive a rule induced the courts to relax it, and the practice was gradually introduced of examining witnesses for the accused, but not upon oath. Sir Edward Coke denounces this practice as tyrannical and unjust, and contended that in criminal cases the accused was entitled to have witnesses sworn for him. It is now in England, by statutes comparatively recent, provided that the accused shall in all cases have the right of having witnesses sworn for him as well as against him. I am not aware that he even yet, in that country, possesses the right to compulsory process to obtain their attendance.

The analogous right of the accused to have the assistance of counsel, does not to this day, or did not very recently,

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exist in England in any criminal cases except indictments for treason.

Such was the state of the common law when the provisions giving the accused the right to compulsory process to secure the attendance of his witnesses, and the right to have the assistance of counsel, were incorporated into the constitution. They were obviously intended to abrogate the harsh and tyrannical rules of the common law which have been referred to, and to place the accused in a position to make his defence and establish his innocence, by giving him rights in all respects similar and equal to those possessed by the government for establishing his guilt. If, then, the accused, by virtue of these provisions, enjoys rights equal to those of the prosecution, and stands, with respect to witnesses, on the same footing with the government, it would seem that the object of the constitution is accomplished. Such seems to have been the construction given by congress to this provision of the constitution.

By section twenty-nine of the crimes act of April 30, 1790, it is provided, "that every person accused or indicted under that act, shall have the like process of the court where he shall be tried, to compel his witnesses to appear at his trial as is usually granted to compel witnesses to appear on the prosecution against them."

The fact that this act passed by the first congress assembled under the constitution, most of whose members had been members of the convention which framed that instrument, gives to this legislative construction a more than ordinary importance.

If, then, the object and effect of the constitutional provision were merely to give to the accused the right to such process as is usually granted to compel witnesses to appear on the side of the prosecution against them, it follows that if by general principles of the laws of nations, as in the case of an ambassador, or by positive treaty stipulations, as in the case of the consul of France, the person sought to be made a witness be beyond the process of the court, neither the accused nor the prosecution is entitled to process against him. The ambassador is, as we have seen, not amenable

in any respect to the laws of the country to which he is sent. The consul is by a treaty, which is the supreme law, placed beyond the reach of the process of the court. The cases seem not distinguishable in principle; for in each the accused, as well as the prosecution, is unable to secure the attendance of the witness, because he is beyond the reach of the court. The hardship to the accused is in no respect greater than if the witness were in a district or in a foreign country into which the process of the court could not run.

From all the provisions of the consular convention, it is obvious that it was intended to clothe the consul with some at least of the privileges of ambassadors, and so far as compelling his attendance as a witness is concerned, to place him beyond the reach of the process of the courts. He is, therefore, out of the jurisdiction to the same extent and in the same manner as the ambassador, who is regarded, by a fiction of law, as retaining his domicile in his own country, and beyond the jurisdiction of the country in which he actually resides.

It is urged that it was decided by Mr. Chief Justice Marshall, on Burr's trial, that the constitutional provision extends to all persons whatever. But in that case, the point to be determined by the chief justice, was whether the accused possessed the right to compulsory process to obtain the production, by the president of the United States, of papers in his possession, deemed material for the defence. Chief Justice Marshall held that the subpoena *duces tecum* should issue; but in treating of the question whether it could issue to the president of the United States, the attention of the court was exclusively directed to the point whether by law the president was exempt from such process. The case of an ambassador, exempted by national law from amenability to all process, or of a consul, exempted by express treaty, was not before the court. "If an exception exists," says the chief justice, "to the general principle that all persons may be compelled to testify for the accused, it must be looked for in the law of evidence." Such an exception does exist in that law in favor of the king; but not, he decides, in favor of the president. If,

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however, by treaty stipulation, which is the supreme law, an exception exists in the case of an agent of a foreign government, expressly placing him beyond the reach of compulsory process, the chief justice nowhere intimates that in such a case the process could issue.

It is urged that if this exemption by treaty is recognized, whole classes of residents might be in like manner placed beyond the reach of the process, and the accused might be deprived in many cases of all means of making his defence.

But it is admitted that, if the testimony of the witness cannot be received, or if from infamy or other reasons he is incompetent to testify, compulsory process cannot issue. The same evil apprehended in the hypothetical case, just mentioned, would arise were congress to declare a class of residents incompetent to testify; and that they have the power to do so as far as relates to proceedings in the federal courts is undeniable. But it seems to me that the accused cannot justly complain of any hardship. He has allowed to him compulsory process to obtain the attendance of all persons within the jurisdiction, and amenable to the process of the court. If any person whose attendance he desires is not subject to the process of the court, and *quondam* *hoc*, out of the jurisdiction, the accused is in the same position as if his witness had left the country, or were dead, or if, when placed on the stand, he had availed himself of his privilege of not criminating himself, or other similar right, and thus withheld testimony of importance.

On a careful consideration of the whole subject, I have come to the conclusion that this court has no power to issue process to compel the attendance of the consul of France in this case. But, on another ground, it is clear to me that this court ought not to compel obedience to the subpoena in this case. The writ issued was a subpoena *duces tecum*, commanding M. Dillon to produce in court a certain document, said to be in his possession.

It has not been disputed that the right of the accused under the constitution, to obtain a subpoena *duces tecum* rests on the same ground as his right to process to compel the attendance of witnesses to testify orally in his favor. The

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very letter of the constitution embraces, it is true, only the latter case, but it is declared by Mr. Chief Justice Marshall (Burr's Trial, p. 183), "that the constitutional and legal right of an accused to obtain process to compel the attendance of his witnesses, extends to their bringing with them such papers as may be material for the defense." "The literal distinction," observes the chief justice, "which exists between the cases, is too much attenuated to be countenanced in the tribunals of a just and humane nation."

But in determining, in the first instance, whether the subpoena to produce the required document shall issue, or, as in this case, the subpoena having issued, in deciding whether the witness shall be compelled to produce it, the court is required to exercise a discretion. "Not," says Mr. Chief Justice Marshall, "that an overstrained rigor should be used with respect to his right to apply for papers deemed by himself to be material, but in order to see that the papers in question are relevant to the case, and such as could be introduced into the defence."

It was for these reasons that the court, on the argument, required the defendant to disclose by affidavit the nature of the document he sought to have produced. That affidavit the counsel for the defendant have declined to furnish. The court is therefore wholly uninformed whether the document is such as could be received in evidence if produced, or whether it is of such a character as that the court ought to compel its production. If the document be wholly irrelevant or inadmissible in testimony, it is clear, from the observations of Mr. Chief Justice Marshall, that the court will not compel its production. And if, as there is reason to suppose, it is one of the official documents of the French consulate, by the very terms of the treaty its production cannot be compelled.

From the tenor of Mr. Chief Justice Marshall's observations on Burr's trial, it is apparent that the right of the accused to compel the production of a document, is not co-extensive with his right to compel the attendance of a witness to testify orally. In considering the nature of the discretion the court will exercise in awarding a subpoena

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duces tecum, he observes: "If it be apparent that for state reasons the papers cannot be introduced into the defence, the subpoena will not issue." And he afterwards says, "that there may be matter, the production of which the court will not require, is certain." It seems, then, from the observations of the chief justice, that though a subpoena may go even to the president of the United States, to obtain his testimony, the accused does not enjoy a co-extensive right to obtain the production of any paper he may require for his defence. Whatever hardship to the accused this rule may occasionally work, the evil does not seem greater than arises in ordinary cases where a witness on the stand is excused for special reasons from testifying the facts within his knowledge, no matter how important to the prisoner the evidence of those facts may be.

By the third article of the consular convention between the United States and France, it is stipulated that the authorities shall in no case examine or seize the papers deposited in consular offices. If a court can compel their production, it is obvious that the protection intended to be given, is gone. If, then, the court will not require the production of papers which, for state reasons, ought not to be produced, it would seem that in a case like the present, an indictment for a misdemeanor, it will not, even if it has the power, violate the immunity and disregard the privileges secured by treaty to the agents of a foreign government.

In a capital case, that the accused ought, in some form, says Mr. Chief Justice Marshall, to have the benefit of papers which the court will not require the production of, is a position which the court would very reluctantly deny. What ought to be done under such circumstances, presents, he observes, a delicate question. But he does not intimate that in a case of misdemeanor, papers which by the supreme law cannot be seized or examined, shall be required to be produced. The most obvious course in such a case, is to admit secondary evidence of their contents. If the accused is unable to furnish such evidence, he is in no worse position than the ordinary case where accident or misfortune has put out of his reach material testimony.

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I think it clear, therefore, that in a case like the present, where the party subpœnaed is the consul of France, who is required to produce a document in his possession, it is not only the right, but the duty of the court to require the defendant to show that the document is not an official paper protected by law from examination and seizure. And that on the failure of the accused to furnish the required information, the subpœna *duces tecum* will not be allowed; or if issued, will not be enforced.

I therefore think that, on this ground alone, compulsory process ought to be refused.

APPENDIX.

The arduous labors imposed upon the Board of Land Commissioners and the United States courts in California by the act of March, 1851, have been nearly concluded. The opinions contained in this appendix have therefore little practical value in this state.

But legislative provisions for the ascertainment and settlement of private land claims in Arizona and New Mexico will at no distant day become necessary.

It has therefore been thought that it might be useful to preserve in a durable form some of the opinions of the district court for California, in which questions likely to arise in the territories mentioned are considered and decided; and especially those in which the uncertainties and embarrassments growing out of the legislation of congress and the rulings of the supreme court are exposed.

Many of these *questiones vexatæ* are of the utmost practical importance; among them are:

1. Shall future legislation strictly limit the litigation in this class of cases to a contest between the United States and the claimant of the land in question, or ought not some provision be made for the assertion of their rights by holders of conflicting or adjoining grants?

2. Should the ascertainment of the location and boundaries of the grants be a matter for judicial inquiry, or be left to executive control?

If, in view of the fact that the whole value of a grant may depend upon its location, it be considered that the claimant should have a hearing and determination of his rights by a court, how shall that hearing be afforded, and who shall be admitted as parties to the cause?

3. Shall proceedings like those provided for in the act of June 14, 1860, be authorized? Or shall provision be made

for the intervention at an earlier stage of the proceedings, of all parties in interest?

4. If the only parties admitted to the original cause be, as under the act of 1851, the United States and the claimant, and provisions for the protection of his rights and those of his subgrantees and of sobrante grantees and coterminous proprietors like those of the act of 1860 be adopted, should these latter be bound by the terms of a decree obtained by the claimant before they were admitted as parties to the cause? (See *Miller v. Dale*, 92 U. S. 478.)

5. What should be deemed the final decree in the cause from which an appeal should lie?

If anything should be found in the following opinions to aid in the proper solution of these questions, so soon to assume great practical importance, that fact will, it is hoped, be received as a justification of their publication.

HOFFMAN, J.

THE UNITED STATES, APPELLEES, v. HENRY CAM-
BUSTON, CLAIMING ELEVEN LEAGUES OF LAND ON
THE SACRAMENTO RIVER.

DISTRICT COURT, DISTRICT OF CALIFORNIA.
JUNE, 1859.

HOFFMAN, District Judge. The claim in this case having been confirmed by this court, the case was appealed to the supreme court, by whom the decree was reversed and the cause remanded for further proofs.

The principal grounds assigned by the supreme court for their decision, are: The want of all record testimony, or any explanation of its absence. The unsatisfactory character of the evidence as to the genuineness of the signatures. The absence of any evidence that the preliminary steps required by the law to a grant of public domain by the governors, had been observed—especially those which were matters of record.

That the grant was not recorded in the proper book, or in any book whatever, so far as appeared by the proofs.

That it was a pure donation, without pecuniary consideration or meritorious services.

That it was unaccompanied by the forms and usages always observed in making grants.

That it was unknown to any one except the grantee and one other interested person, until 1850.

That it was made by a governor who had recently expelled his predecessor, and who was not proved to have been recognized by the supreme government.

That it was made but one month and a half before the conquest of the country by the United States forces, and during the very heat and conflict of the struggle in which the power of the governor was overthrown; and, therefore, that his authority to make it, and the *bona fides* of its exercise, should be scrutinized with great care.

As these objections had not been urged before the commissioners or this court, the cause was remanded that the claimant might, if in his power, remove them by the introduction of further evidence.

Further evidence has accordingly been taken, and the cause is again submitted for decision.

As to many of the points alluded to by the supreme court, the testimony leaves no room for doubt. The original grant is produced from the archives where it has remained since 1850, when it was deposited with Major Canby.

The signatures of Pico and Moreno are undoubtedly genuine. The grant is also shown to be in the handwriting of Agustin Olvera, who was secretary to the departmental assembly; and Mr. Hopkins, the keeper of the archives, states that in the water-marks and general appearance of the paper on which it is written, it corresponds with paper used at its date. That officer seems to entertain no doubt of the genuineness of the signatures, and his opinion is of great value.

The real point in the case is not whether Pico and Moreno signed the grant, but *when* they did so.

It is also shown, and the fact is known to the court as part of the history of the country, that Pio Pico had been recognized by the supreme government as constitutional governor of the department before the date of this grant.

Before proceeding to consider the proofs as to the fact that the preliminary steps requisite to a grant were taken, and which explain the absence of record evidence that it issued, it may be observed that, according to the usage of the Mexican government, the record evidence, as well of the preliminary proceedings as of the issue of the grant, should be found in the *expediente*, and in the book known as the *Toma de Razon*.

The *expediente*, as is well known, consisted of the petition, with the marginal order of the governor; the *informes*, when they were furnished; the decree of concession, and, usually, a *borrador*, or draft, of the title delivered to the party. These papers, stitched together, formed the *expediente*, which was preserved among the archives and formed the only

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record of the proceedings, except that contained in the *Toma de Razon*.

This last was a book in which short entries were made of the date of the grant, the name of the grantee, and that of the land granted.

If, therefore, the *espediente* in any case be lost, and the *Toma de Razon* for the year in which the grant was made be also lost, no record evidence of the grant would exist, unless it should happen to be referred to in other grants or *espedientes*, a reference not likely to occur with respect to a grant of late date.

It is shown in this case, and the fact is notorious, that the book of *Toma de Razon*, for the year 1846, is not among the archives. It is also in proof that the archives were, for some months after the seizure of the country by the Americans, left in a condition where spoliations or loss of documents may have taken place. But the extent of such spoliations has been greatly exaggerated, for the archives exist in a degree of completeness and perfection greater, perhaps, than could have reasonably been anticipated, as is proved by the fact that all the *espedientes*, to the number of four hundred and twenty-two, of which a list was made by Jimeno, are found on the files. Nevertheless, it is possible that some *espedientes* have been lost. Colonel Fremont appears to have removed several, which were lost in the mountains; and the testimony of Captain Halleck shows that such an accident may very possibly have happened.

The absence, therefore, of all record evidence of this grant does not conclusively show that no *espediente* in the case ever existed. It may possibly have been lost. But such an accident is extremely improbable.

It has already been stated that all the *espedientes* mentioned in Jimeno's list, to the number of four hundred and twenty-two, are found in the archives. The latest concession entered in that list is dated December 24, 1844. I am not aware that the *espediente* for any concession mentioned in the *Toma de Razon* for the succeeding year, and which contains entries down to December 23, 1845, is lost—though such may be the case.

It was certainly, therefore, by a most unfortunate, and what would, *a priori*, be thought a most improbable accident, that the *expediente* in this case was lost, when so large a number of similar documents, subjected to the same chances, were preserved in an unbroken series.

To prove the existence of the *expediente* the claimant has examined Pio Pico and José Matias Moreno.

Governor Pico swears that he does not remember the petition, but that it must have been presented, or the grant would not have issued; that he believes the signatures to be those of himself and Moreno, and that he also believes the grant was signed on the day it bears date. He does not pretend, however, to remember the fact of having made the grant, nor that any *informes* were asked for or obtained, but, with his usual caution or evasiveness, confines himself to the expression of his belief that it bears his signature and was executed at its date.

Moreno's testimony is more positive. He swears that a petition signed by Cambuston, was addressed to the governor, praying for certain lands in the north; that the petition was dated previously to the grant; that he saw this petition when he became secretary, May 1, 1846, and that attached to it were the *informes* of certain authorities (who they were he does not recollect), and an order of the governor directing the grant to issue.

He also testifies that he made a note of the grant in the *Toma de Razon*, and that the *expediente* remained among the archives until Governor Pico and himself were driven from the country.

No other witness is produced by whom the petition of Cambuston or the *expediente* was ever seen, or who has any knowledge of their existence.

The officers who gave the *informes* are not produced, though it would seem not difficult to discover who they were, and to procure from them evidence of the fact that they reported on the application.

As Governor Pico makes no mention of any *informe*, and merely infers that a petition was presented from the fact that a grant issued, the only evidence tending to show that

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the *expédiente* was formed, and that the usual preliminary steps were taken by the governor, is that of Moreno—a witness not unknown to this court, and whose credibility it has, on several occasions, been called upon to consider.

The existence of a document of this character—unknown to any other person—which is not found in its proper place of custody, where it would be found unless an extraordinary accident be supposed to have occurred—a part of which (*viz.*, the petition) would probably have been known to other persons than the applicant, and certainly to the authorities by whom the *informe* was furnished, can hardly be said to be satisfactorily proved by the uncorroborated testimony of Moreno.

The fact, however, that a grant was asserted to be in existence in 1846 or 1847, is testified to by some witnesses on whom the court can rely with entire confidence.

P. B. Reading testifies that he heard of this claim as early as 1846; that he heard several persons speak of the Cambuston claim as adjoining Sutter's northern line near the "Buttes," on the Sacramento. On his cross-examination he states that, according to his best recollection, he heard this in 1846—certainly not previously—but that in looking back for thirteen years, it is not possible to recollect such a fact with certainty unless connected with some event.

Colonel J. D. Stevenson, who arrived in California March 6, 1847, in command of the First Regiment, New York Volunteers, testifies that he became acquainted with Cambuston in April, 1847, and was intimate with him and his family until he left Monterey in May of the same year. That he renewed his acquaintance with him in October, 1848, and has been closely intimate with him ever since. That in 1847 he was in the habit of visiting daily the Soberanes family, with whom Cambuston was then residing, and into which Cambuston subsequently married. That Doctor Townsend and his wife were also residing with that family; and that he first heard the grant spoken of by these latter in presence of Cambuston. That it was alluded to as being in the Sacramento valley between Sutter's line and that of

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a man named Flugge. That subsequently, in May, 1847, he became acquainted with Flugge and continued intimate with him until he (witness) left Los Angeles in the fall of 1848; that he had frequent consultations with him respecting his rancho, and that in various conversations, Flugge spoke of a grant to Cambuston between his own rancho and Sutter's line. That in October, 1848, or the spring of 1849, Cambuston showed him (witness) a paper purporting to be a grant for the rancho in question; that he (witness) advised him to retain it carefully until a government should be organized, and that he subsequently filed it with Major Canby, by his (witness') advice.

Jacob A. Morenhout testifies that he first heard of the claim of Cambuston in 1846, soon after his arrival in California. That when obtaining a description of the French residents from his predecessor in the office of consul of France, he was told by the latter that Cambuston had a claim for a large tract of land on the Sacramento river, but that it was then thought of no value. That in 1847, as he believes, or perhaps in the beginning of 1848, Cambuston deposited in the consulate a bundle of papers, among which was this title, and that he is positive he saw the title long before there was any doubt raised about it, and before the lands were of any value.

The evidence of this witness, which had been taken before the commissioners, was disregarded by the supreme court because of his interest in the suit. The testimony above cited is contained in a deposition taken since the cause was remanded. In that deposition he states in the most positive manner that he has sold out all his interest in the claim, and that he has now no interest whatever in the event of the suit. His character is wholly unimpeached, his testimony entirely uncontradicted. He came to California as consul of France, and he continues to hold the office of vice-consul at Monterey to the present time. I know of no reason why his statements should not be received by the court with entire confidence.

Captain H. W. Halleck testifies that he heard of this grant in the spring of 1847; and also heard that Cambus-

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ton was endeavoring to get Americans to go and settle upon it.

It must, I think, be taken as proved, that a grant of some kind was in existence shortly after the date of the grant produced in this case, and before the return of Pio Pico to California in the spring of 1848. All the witnesses agree that the grant heard of by them was for lands in Sacramento valley. Colonel Stevenson identifies the grant he heard of with that now exhibited by the designation of Flugge's rancho as one of its boundaries—and his conversation with Flugge respecting it; and Morenhout mentions that he was "attracted by the quantity, eleven leagues, but it was not worth anything."

The objection, therefore, of the supreme court, "that the grant was unknown to any person besides the grantee and another interested party, until filed among the archives in 1850," is conclusively answered.

There is also some evidence to show that in October, 1846, the land was occupied and cultivated. But the only testimony on this point is that of Victor Prudon—and the fact is not material, for the occupation testified to was after the conquest, and the existence of the grant shortly after its date is proved, as we have seen, by more reliable testimony.

With respect to the consideration for the grant, Governor Alvarado testifies that Cambuston rendered services as public printer to the government from 1841 to 1846; that he was not paid for those services, and that he, Alvarado, offered him land in payment, which he did not then accept, but that he (witness) heard that one of his successors had granted land in compensation. With respect to this testimony it is to be observed:

1. That it is only hearsay.
2. That no mention is made in the grant of any such consideration.
3. That it appears from the documents produced from the archives, and which will hereafter be referred to, that on the eighth of August, 1844, Bocanegra, Minister of Relations of Mexico, transmitted a dispatch to the governor of California, in which he inclosed a communication from the

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French minister at Mexico, complaining that Henry Cambuston, a French citizen, had been driven from California, and that Cambuston protested his innocence, etc.—the French minister, therefore, demands that he be permitted to return, etc.

The statement of Alvarado, that from 1841 to 1846 Cambuston was employed at Monterey as teacher and public printer, must consequently be untrue. It cannot be said, therefore, that the objection raised by the supreme court that this grant was a pure donation, has been satisfactorily answered.

An objection, however, is taken to this claim, which was not urged heretofore, either in this or the supreme court. It is claimed that Cambuston was a citizen of France, and therefore incapable of taking a grant.

This objection is urged:

1. To show that, even if all the preliminary steps had been taken, and the grant in all other respects regularly made, the governor exceeded his powers.

2. That the fact that the grantee was a foreigner, and notoriously known to be such, would certainly have been made known to the governor had the usual *informes* with regard to the qualifications of the applicant, etc., been asked for and obtained, and that the fact that he was so known to be a foreigner, is a strong circumstance to show that the grant was executed without the usual *informes* having been asked for.

3. That the issuing of so large a grant to a foreigner at that time, and under the circumstances of its alleged execution, shows the want of that *bona fides* on the part of the governor in the exercise of his authority, which, as also the existence of his authority to make the grant, the supreme court has declared, "should in this and similar cases be inquired into, and scrutinized with great care."

The evidence which is relied on to prove that Cambuston was an unnaturalized foreigner, is the following:

1. The deposition of Morenhout, taken by the claimant. This witness testifies that when he arrived here as French consul, he obtained from his predecessor a description of

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the French residents of the country, and was told that Cambuston had a grant, etc., and that subsequently Cambuston deposited his papers in the consulate.

This witness does not expressly state that Cambuston was a Frenchman, but it is clearly to be inferred from his account that he first obtained information about his affairs, as such, and the subsequent reception of the papers in the consulate, can hardly be accounted for on any other hypothesis.

2. Colonel Stevenson, also a witness for the claimant, states that Cambuston spoke French and Spanish, but no English.

3. It appears from the archives that, on the eighth of August, 1844, a dispatch was sent by Bocanegra, minister of relations of Mexico, to the governor of California, inclosing a communication from the French minister at Mexico, in which the latter complains that Henry Cambuston, a Frenchman, established in Monterey, had been driven from California. That Cambuston protested his innocence. The minister, therefore, remonstrates against such arbitrary conduct, and asks that he be permitted to return, etc. It also appears that, on the twenty-ninth of January, 1846, Manuel Castro, then prefect of Monterey, transmitted a communication to the secretary of the department, containing an account of a quarrel which had occurred between himself and Henry Cambuston, a teacher in the public school, and inclosing copies of communications relative thereto, between Louis Gasquet, acting French consul, and José Castro, commandant-general, and also a copy of the proceedings had against Cambuston by Manuel Castro. In all these proceedings, Cambuston is spoken of, both by the French consul and General Castro, as a French citizen. It does not, however, appear, that the interference and protection of the French minister in 1844, or that of the French consul in 1846, were claimed by Cambuston.

As this objection was for the first time taken in the brief filed by the United States, the case was opened that the United States might adduce the testimony above referred to from the archives, and that the claimant might show, if

possible, either that he was not a foreigner, or had been naturalized. No proof on these last points has been submitted by him. In the briefs filed on the part of the claimant, it is not urged that as a matter of fact Cambuston is not a Frenchman. He resides in this country, and is not unfrequently in this city. He is known to a large number of people, as is shown by the witnesses whom he has himself produced. If he were not a Frenchman, Morenhout, Colonel Stevenson, and many others could readily have so stated. The absence, therefore, of any attempt to repel the presumptions arising from the proofs above cited, and even of any denial of their truth, justifies me in treating those proofs as establishing that Cambuston was a French citizen. Assuming, then, that he was a foreigner, and not naturalized, we proceed to inquire whether he could take lands by grant in colonization, and whether in attempting to grant lands to him, Governor Pico exceeded his authority.

By the law of 1824, foreigners were not only permitted but invited to settle, as colonists, on the vacant lands of the Mexican republic.

But the circumstances connected with the settlement of Texas, or other considerations, induced the government, in 1836, to adopt a more jealous and exclusive policy.

By the constitutional laws of December 29th of that year, it is provided, "that foreigners cannot acquire real estate in the republic, unless they have been naturalized and married to a Mexican woman, and have otherwise complied with the laws relating to such acquisitions. The acquisitions of colonists will be subject to special laws of colonization."

Under this provision it might perhaps have been doubtful whether it was intended merely to prohibit the acquisition of lands by foreigners in the ordinary modes, leaving their rights to acquire lands as colonists to be governed by the *then existing special laws*, or whether it was intended to make the prohibition general, leaving their rights as colonists to be fixed by *future special laws*.

But we have abundant evidence of the construction given to this provision by the authorities of California. In 1843,

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Isaac J. Sparks, a native of the United States, but a naturalized Mexican, applied for a grant of land, and the usual *informes* were ordered. The alcalde of Santa Barbara reported that Sparks "was married in the United States, which is a good reason why he cannot marry with any one in this country." And Dominguez, the prefect, reported that "as the law in speaking of strangers, prohibits them from acquiring real estate in the republic unless naturalized therein, married with a Mexican, etc., your excellency will order in the matter what may be proper."

On these reports Micheltorena orders the proceedings to be suspended "until the arrival of the new constitution," viz., that of 1842, which will presently be noticed.

In December of the same year Sparks renewed his application, whereon Jimeno, the secretary, reported:

"The party interested has not acquired the land he petitions for, on account of his not being married to a Mexican, as required by the constitution of 1836, and although by a subsequent decree foreigners were allowed to acquire real estate in the republic, exceptions are made in the frontier departments, which have been subjected to regulations which have not yet been received. I believe it would be an act of justice to grant the land to the petitioner, as he is honorable and industrious, and a naturalized citizen."

The land was accordingly granted, but without the power to sell.

In the case of Sansevain, a French citizen, who applied for a grant, Jimeno reported as follows: "Don Pedro Sansevain is not naturalized, an *indispensable requisite* in order to acquire property in the territory, but he may be permitted to cut wood upon the land until he is naturalized and can receive the title he desires."

Sansevain was accordingly naturalized, and on the twenty-first of April, 1846, renewed his application as a Mexican, by naturalization, to Governor Pico, by whom the land was granted on the twenty-first of April, 1846, about one month before the date of the grant to Cambuston. In the decree of concession and the final title, the fact is carefully set forth that the grantee is a Mexican citizen by naturalization.

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I am not aware of any case in which the *expediente* shows that this "indispensable requisite," as it is called by Jimeno, was dispensed with. It is surprising that the first and only instance of the kind should be that of Cambuston, who two years before had been driven from the country, and a few months before had been involved in a long and acrimonious dispute with the authorities, in which the representative of his nation felt himself called on to interfere.

The subsequent decree to which Micheltorena and Jimeno allude, is undoubtedly that of March, 1842.

By this law, foreigners, not citizens, were authorized to acquire real property in the republic; but by article 9, it was enacted, that "those arrangements should not include the departments on the frontier and bordering on other nations, in regard to which special laws of colonization will be enacted, without the power to foreigners to ever acquire property in them without the *express license* of the supreme government." (Rockwell, p. 612.)

It is suggested that this was a restriction intended to be made in future laws of colonization, and not a limitation in the then existing laws.

But even if this be so, the latest existing law was that of 1836, which we have seen denied all right to foreigners to acquire lands, unless naturalized and married to a Mexican; and it is impossible to suppose that Santa Ana, when by his edict of 1842 he removed these disabilities as to the central departments, and declared that the frontier departments were not included in the new arrangements, but with respect to them special *colonization* laws should be enacted, under which foreigners should not acquire lands without the express license of the supreme government, intended that the ancient and liberal law of 1824 which offered lands to all foreigners, without the license of the supreme government, should remain unrepealed.

The fact that future special laws of colonization containing this restriction were promised, shows that he, like Micheltorena, Jimeno, and the other authorities of California, regarded the law of 1824 as modified or repealed, in this respect, by the law of 1836.

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But even if, contrary to the construction given to it by Jimeno, we construe the law of 1836 as not repealing the colonization laws of 1824—that repeal must, nevertheless, be deemed to have been effected by the twelfth article of the law of 1842.

That article provides that “foreigners cannot acquire royal or public lands, in all the departments of the republic, without contracting for them with the government, which possesses this right as representing the domain of the Mexican nation.” (Rockwell, p. 613.)

It must, therefore, be concluded, that at the time the grant to Cambuston purports to have been issued, he had, if an unnaturalized foreigner, no capacity to take lands without the express license of the supreme government.

It is urged, however, that the court is bound to presume that the governor did not exceed his authority; and, therefore, it must presume either that Cambuston was naturalized and that the governor was only apprised of the fact by the preliminary proceedings, or else that the express license of the supreme government was obtained.

It is undoubtedly true, as a general principle, that the public acts of public officers purporting to be exercised in an official capacity and by public authority, shall, in the absence of proof to the contrary, be presumed to have been done in the exercise of a legitimate and not a usurped authority. (*United States v. Arredondo*, 6 Pet. 727.)

‘ The acts, therefore, of a public officer, to whom a public duty is assigned, within the sphere of that duty are, *prima facie*, taken to be within his power. “He who would controvert a grant executed by the lawful authority, with all the solemnities required by law, takes upon himself the burden of showing that the officer transcended the powers conferred upon him, or that the transaction is tainted with fraud.” (*United States v. Clarke*, 8 Pet. 453.)

These principles are declared by Mr. Chief Justice Marshall, “to be too deeply founded in reason and law, ever to be successfully assailed.”

The justice of this remark is obvious. As by hypothesis the only evidence of the existence or non-existence of the

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power in the officer is the fact that he exercised it, the court is compelled to adopt one of two presumptions: either that he acted legally, or illegally. In the absence of all proof to the contrary, it could not rationally be presumed that he acted illegally. The other alternative must, therefore, be accepted.

But the force of this presumption must, from the nature of things, vary with the circumstances: where the officer, as a governor or viceroy, appointed by the king, dependent on his favor and liable to be punished for disobedience; where the act in question is one of a series by which he repeatedly and notoriously assumed the power in question; where no assignable motive appears which could have induced him, in the particular case, to exercise a usurped authority, nor any circumstances either in his own situation or that of the grantee, or in the mode of exercising his power, which suggest doubts as to the *bona fides* of the transaction, the presumption we are considering may be regarded as almost conclusive.

But where, as in this case, the grant purports to have been made by a governor within a few weeks of the time when the government of the territory passed from his hands, and “during the very heat and conflict of the struggle in which his power was overthrown”—where the evidence that the formalities required by law were observed, is imperfect and unsatisfactory, and rests wholly in parol—where it does not appear that any preliminary inquiries were made as to the point on which he is supposed to have exceeded his authority—and where the situation of the granting officer, and the mode in which he exercised his authority in other cases at or about the period when the grant purports to have been issued, suggest the suspicion of carelessness, if not recklessness, in the exercise of his powers—under all these circumstances, it must be admitted that the presumption we are considering loses much of its force, if it be not entirely repelled.

It is declared by the supreme court in this case, that this grant, purporting to have been made under the circumstances above referred to, and “all others similarly situated,

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should be scrutinized with great care, both as to the authority of the governor to make them and the *bona fides* of its exercise."

But how can such scrutiny be exercised if we apply to them a blind and technical presumption of legality, raised by the mere fact that the governor signed the grant, and treat that fact as satisfactory evidence of the governor's authority, unless the United States produce proofs to the contrary, in their own nature impossible to be furnished?

The United States have shown that the governors of the frontier departments had no power to grant lands to foreigners; certainly not without the express license of the supreme government, if we adopt the construction of the law of 1842, most favorable to the claimant.

They have also shown, I think satisfactorily, that the grantee was a Frenchman, and that within a few months of the date of the grant his rights as such were vigorously asserted by the representative of his nation; that he was by that officer and by the California authorities treated and recognized as such throughout a protracted proceeding; and, as this proceeding was taken for his benefit, it may be reasonably inferred to have been at his instance; and he should be regarded as having asserted his *status* as a French citizen, and as having demanded protection of the representative of his country as such.

No *informes* or preliminary inquiries are proven which show that it was ascertained by the governor that the grantee had been naturalized, nor is he, as was usual and almost invariable in similar cases, declared to be such in the grant.

If, then, this proof be not sufficient to overcome the presumption arising from the fact that the governor signed the grant, in what way can it be met?

The United States cannot prove the negative fact that the grantee was *not* naturalized. They may raise, as they have done, a strong presumption to that effect, by showing that he was of French birth, and that rights were claimed for him as a French citizen a few months previous to the grant. But as the forms of the proceeding to obtain naturalization were exceedingly simple, and they could be taken before

any magistrate, it is impossible to prove that a particular person was not naturalized.

It seems to me clear, therefore, that in such a case the foreigner should prove the affirmative fact that he was naturalized—a fact peculiarly within his knowledge, and the means of proving which are easy.

No such proof has been offered in this case.

The same observations apply to the other presumption in which the court is asked to indulge, viz.: That the grant was expressly authorized by the supreme government. The very state of facts for which the United States contend—viz., that no license was obtained—supposes affirmative proof that it was not given to be unattainable. For all that could be shown would be that no such license appears of record—in the archives or elsewhere—and such is the proof in this case.

Governor Pico, who was a witness for the claimant, makes no mention of any such license; and as it would have been the solitary instance of the kind which, so far as I am informed, ever occurred in the history of California, the fact could hardly have escaped his memory, nor would the claimant have omitted to establish it by the testimony of the governor.

Besides, it is impossible to suppose that so protracted and troublesome a proceeding as demanding and obtaining the license of the supreme government would have been resorted to, when the applicant could, without delay or difficulty, have been naturalized by an ordinary magistrate.

The idea, therefore, that such a license may have been obtained, appears to me rather an ingenious suggestion of counsel, than a legal presumption which the court should indulge.

But the case of *United States v. Reading*, 18 How. 9, is relied on as an authority decisive of this case.

In that case the grant contained the usual recital, "that the proper proceedings and investigations had been previously complied with according to the provisions of the laws, etc.," in the form invariably adopted in all grants.

"Now this," say the supreme court, "is not merely the

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language of clerical formality, though it might be the same from usage in like cases, but it is a declaration of the governor's official and judicial conscience; that his power to make the grant has been used in a fit case," etc.

"We consider it *conclusive* of the fact of the petitioner's *naturalization*, precluding all other inquiries about it, in our consideration of this case, by the record."

With reference to that case, it is to be observed:

1. That the grant to Major Reading states "that he is a Mexican by naturalization," which is not stated in the grant to Cambuston; and it further appeared, from the *espediente*, that the usual *informes* were obtained, and the petitioner reported by Jimeno to be a proper person for the governor's favor.

2. So far as the principles laid down by the supreme court, in the extract above cited, can be supposed to apply to this case, they must be taken as overruled by its more recent decision in the case we are now considering.

"It is true," say the supreme court, "the document recites that a petition was presented, and that the customary investigations had been made in respect to the application. *But this cannot be regarded as conclusive, or even satisfactory evidence of these facts* when the question is raised, whether or not the alleged grant is made in conformity with the requirements of law—in other words, whether the preliminary conditions had been complied with, which enabled the governor in the particular case to make the grant." (*United States v. Cambuston*, 20 How. 68.)

The court then proceeds to distinguish between the Florida and Louisiana cases and those in California. In the first, the existence of the power to grant and the regularity of its exercise were presumed from the facts of the habitual granting of lands by certain officers, and the customary mode adopted in making them. In the California cases the power is expressly conferred and the manner of its exercise prescribed by law—and therefore no presumptions are admissible. But the court must look to the law for the power to make the grant, and the manner of its exercise.

If, then, the court refused to treat the recital that the cus-

tomary investigations had been had, etc., as conclusive or even satisfactory evidence of the fact, but remanded the case that such proof might be given, it is difficult to perceive how this court can treat the same recital as proving not only that the investigations were made, but that they resulted favorably to the petitioner, and that he was ascertained to have been naturalized, especially as he is not stated in the grant to have been a citizen, either by birth or naturalization.

In the case of Reading, the *informe* of Jimeno, and the statement in the grant that he was a naturalized citizen, may well be regarded as a judicial ascertainment of the fact precluding all subsequent inquiries upon the subject.

But in this case no *informes* are produced. We have only the statement of Moreno that they existed in an *expediente*, which is lost, and which no other witness ever saw. As to its contents we are wholly uninformed—and the grant does not contain the result of the investigation, for contrary to the almost invariable practice, the political *status* of the grantee is not mentioned.

One other argument urged by the counsel for the claimant remains to be noticed.

It is insisted that the "prohibition against foreigners holding lands is not restrictive upon the power of the governor to remove the disability, and a grant by him operates as an enfranchisement."

In support of this proposition various cases are cited. (20 Johns. 706; 7 Id. 290; 9 Id. 362; 5 Cowen, 397; 2 Wend. 133.)

But the distinction between those cases and the case at bar is obvious.

In the decisions referred to, it is held that where the legislature directed a grant to issue to a particular person by name, or to a class of persons of which he was one, and a patent was executed to him *in pursuance of the statute*, it could not be objected that other and general laws disabled him from taking. The same sovereign authority which created the disability was competent to remove it, and the law authorizing the patent was held to operate as a repeal *pro tanto* of the previous general laws. In such cases the

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question is clearly one of intention, not of power. But the governor of California had no similar power. He was a subordinate agent with powers conferred and limited by law. To say that he had authority to remove a disability created by law, is to say that he was above and not subject to the law—and to affirm in effect that a violation of law by an officer of government operates as a repeal of it.

I have thus, in obedience to the injunction of the supreme court, inquired into and scrutinized this case with great care as to the authority of the governor to make the grant, and the *bona fides* of its exercise.

The result of that inquiry is, that the grantee was a foreigner and does not appear to have been naturalized; nor is it shown that the express license of the supreme government was obtained. The governor, therefore, had no authority to make the grant.

The claim must be rejected.

NOTE.

[It will be observed that in the foregoing opinion the question is not presented by counsel, nor discussed by the court, whether a grant by the governor, unapproved by the departmental assembly, vested such a title in the grantee (assuming him to have been capable of taking) as the United States are bound to respect notwithstanding that the land was not occupied or cultivated before the subversion of the Mexican authority. This point is supposed to have been determined by the supreme court in the case of *The United States v. Fremont*; the omission to take possession and fulfil the conditions during the short interval that elapsed between the date of the grant and the acquisition of the country by the United States, being considered by the counsel for the United States entirely insufficient to give rise to the presumption of abandonment.

The following note was prepared for insertion in a volume of decisions of this court in land cases which it was proposed to publish. That project having been abandoned, it has been thought convenient to append it to the foregoing opinion. "The case of *Cambuston* was among the first decided by this court under the authority of *The United States v. Fremont*, and is believed to present a striking illustration of many of the observations in the annexed note.]

The case of *The United States v. Fremont* was among the earliest of the cases decided by the United States district court on appeal from the board of commissioners. It was the first in which the supreme court announced the principles by which this class of cases was to be decided.

It has, therefore, remained the most important and the leading case on this branch of the law, and has exercised a controlling influence on all subsequent decisions of this court.

As the judgment of the district court was reversed by the supreme court, a fuller exposition of the grounds of that judgment than circumstances then

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permitted, will, it is hoped, not be deemed disrespectful to the supreme court, nor, perhaps, prove uninteresting to the reader.

The authority of the governor of California to grant lands in colonization was derived from the law of 1824, and the regulations of 1828 made by the executive in virtue of the authority conferred by the law.

The first eight articles of those regulations are as follows:

"1. The governors of the territories are authorized (in compliance with the law of the general congress of the eighteenth of August, 1824, and under the conditions hereafter specified), to grant vacant lands in their respective territories, to contractors (*empresarios*), families, or private persons, whether Mexicans or foreigners, who may ask for them for the purpose of cultivating or inhabiting them.

"2. Every person soliciting lands, whether he be an *empresario*, head of a family, or private person, shall address to the governor of the respective territory, a petition setting forth his name, country, profession, the number, description, religion, and other circumstances of the families, or persons with whom he wishes to colonize, describing, as distinctly as possible, by means of a map, the land asked for.

"3. The governor shall proceed immediately to obtain the necessary information whether the petition embraces the conditions required by the said law of the eighteenth of August, both as regards the land and the candidate, in order that the petitioner may at once be attended to, or if it be preferred, the respective municipal authority may be consulted, whether there be any objection to making the grant.

"4. This being done, the governor will accede or not to said petition, in exact conformity to the laws on the subject, and especially the before-mentioned one of the eighteenth of August, 1824.

"5. The grants made to families or private persons, shall not be held to be definitively valid without the previous consent of the territorial deputation; to which end the respective documents (*expedientes*), shall be forwarded to it.

"6. When the governor shall not obtain the approbation of the territorial deputation, he shall report to the supreme government, forwarding the necessary documents for its decision.

"7. The grants made to *empresarios* for them to colonize with many families, shall not be held to be definitively valid until the approval of the supreme government be obtained, to which the necessary documents must be forwarded, along with the report of the territorial deputation.

"8. The definitive grant asked for being made, a document signed by the governor shall be given, to serve as a title to the party interested, wherein it must be stated that said grant is made in exact conformity with the provisions of the laws in virtue whereof possession shall be given."

Under the earlier governors, and especially under Figueroa, who appears to have been among the most enlightened of them all, the practice observed in granting lands appears to have been in precise conformity with the requirements of the regulations.

The petition, accompanied by the *diseño*, was presented, and was referred by a marginal order to the municipal authorities, or other fit persons, for *informes* as to the qualifications of the petitioner, his means of occupying the land, etc., and also as to the condition of the land, whether vacant or not, and as to its extent.

When the *informes* were received, the governor decided upon the application. "If he acceded to the petition," he did so by making a short decree, usually called the decree of concession, which was attached to the petition and *informes*, and constituted the *expediente*. The decree of concession usually directed that the *expediente* should be sent to the most excellent departmental

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Nota.

assembly for their approval, but no title paper or *documento* was as yet delivered to the party interested. It was not until after the assembly had approved the concession, and it had thus become "definitively valid," that the *documento* or title paper mentioned in the eighth article was delivered "to the party interested to serve as a title." This *documento* always expressed that it was in conformity with the provisions of the laws; and it contained various conditions, the breach of which subjected the land to "denouncement" by any one who might desire to obtain it for himself.

It would seem from the language of the eighth article that it was only when the concession had thus become definitive, and when the *documento* had been furnished to the party, that he had the right to apply to the "respective judge" to obtain a judicial measurement and delivery of possession of the land. In one instance, at least, which has fallen under my notice, it appeared that the judicial officer refused to give the possession on the ground that the concession had not been approved, and, on appeal to the governor, the local officer was sustained.

The loose and informal mode of conducting business, the small value of the lands, the infrequency of the meetings of the assembly, and other causes, soon led the governors to depart from the strict course of procedure with respect to concessions of land which Figueroa had observed; and the practice grew up of issuing the final *documento*, or title paper, immediately upon the making of the decree of concession. A clause was, however, inserted in the title, to the effect that the grant was subject to the approval of the most excellent departmental assembly. The grant was then, in advance of the approval, delivered to the party, and he usually proceeded at once to occupy the land.

It would seem, however, from the instance cited above, that when the point was formally presented to the governor, he did not feel at liberty to direct the judicial possession to be given by the "corresponding judge," until, by the approval of the assembly, the grant had assumed definitive validity.

Of the grants so made by the various governors, many were subsequently approved by the assembly. This was done after a reference to a committee of that body, and upon a report by that committee. A resolution of approval was then passed, and a *testimonio*, or certified copy of the resolution of approval, was furnished to the party interested.

That the assembly did not consider their duties merely formal, is proved by the fact that, in some instances, the extent of the land granted was materially reduced, or rather the concession was approved only to a limited extent. In many cases, however, the *expedientes* seem never to have been transmitted to the assembly, and many of the ancient inhabitants of the country were found at the conquest in possession of and claiming to own lands by virtue of grants by the governor, unapproved by the departmental assembly.

There were also found in the possession of many persons, grants by the governor for extensive tracts which they had never occupied, nor, as in the case of the grant to Alvarado, perhaps even seen. As the Mexican rule approached the period of its final subversion, when war with the United States was on all sides recognized as impending, and after the rising of the American settlers in the country, known as the "Bear Flag War," had occurred, the governor (Pio Pico) appears to have distributed grants with a lavishness that would

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justify the suspicion that he hoped to secure to his countrymen, by the pen, the lands he foresaw they were about to be deprived of by the sword.

Under these circumstances, it became a point of vital importance to determine the effect and legal operation of the unapproved grants of the governors of California.

On this point two opposing views were suggested.

1. It was held by some that the regulations merely provided that the concessions of the governor should not possess *definitive* validity until approved by the assembly or the supreme government, and that they did not provide that until such approval they should possess no validity whatever. That even when disapproved by the assembly the grant did not fail, but it was then the governor's duty to transmit the *expediente* to the supreme government for its approval, and the grant remained valid and effective, though not *definitively* so, until the supreme government had refused to approve it. That the concessions of the governor must, therefore, be deemed to have passed to the grantee a base or determinable fee, liable it is true to be divested by the refusal of both the assembly and the supreme government to approve, but remaining a vested and valid right of property until that contingency occurred. It was therefore contended, that the practice of issuing the grants immediately on making the decree of concession, and subject to the approval of the assembly, was more strictly in accordance with the law than that which obtained under Figueroa; and that the estates so granted, not having been divested by any refusal to approve on the part of the Mexican authorities, must be held valid and indefeasible by the American authorities.

It was also urged that, inasmuch as by the regulations it was the duty of the governor, not of the grantee, to transmit the *expediente* for approval to the assembly, any omission or neglect of duty in that respect, ought not to work an injury to the grantee.

2. On the other hand, it was maintained that the regulations, by a just and inevitable construction, showed that, to make a valid or complete grant, the concurrence of either the assembly or the supreme government was necessary; that the practice under Figueroa was the only practice which could have been adopted in strict conformity with the law; and that grants issued in advance of and subject to the approval of the assembly, were essentially inchoate or imperfect titles. That the application, therefore, of the grantee for a confirmation, was in effect an application to the United States to complete and give definitive validity to a grant which, by Mexican law, was incomplete, and not "definitively valid," and which the United States were at liberty to refuse, unless the grantee could urge equitable considerations in his favor, such as would have bound the conscience of the former government if it had been asked to approve the concession.

That these equities were to be found in the fact of the occupation and cultivation of the land, which would justify the grantee in asserting that he had rendered, and the former government received, the consideration upon which, by the policy of the colonization laws, the lands were granted. But where no such fact appeared, and where no settlement had been effected, and whether by the fault or the misfortune of the grantee was immaterial, the United States were at liberty to refuse to confirm and complete the title, de-

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fective and incomplete in itself, and in aid of which the claimant could invoke no equities.

The last view was that adopted by this court, for reasons, the fallacy of which I am obliged to confess myself to this day unable to perceive. It will be sufficient in this note rather to indicate, than to develop or enlarge upon them.

1. Whatever may be said of the validity which the unapproved grants of the governor may have possessed, it is evident, from the regulations, that the power to grant lands was intended to be vested in the governor concurrently with the assembly, or by and with the consent of that body. That the power of granting the public domain in the territories was not to be exercised at the absolute will of a governor appointed at Mexico, but was to be subject to the approval of the local legislative assembly, and in case of disagreement to the final decision of the supreme government.

To carry out this policy, the only strict and regular mode which could have been adopted was that pursued by Figueroa, whose practice was, as already stated, to decide himself in the first instance on the application, that is, to accede or not to the petition, then to transmit the *expediente* to the assembly, and to issue the *documento* or title paper when their approval had been obtained.

But if the governor had authority to grant an estate to an applicant, which could only be divested by the refusal of both the assembly and the supreme government to approve the grant, he could readily have defeated the whole policy of the law, for he had only to omit to send in the *expediente* for approval. The contingency on which the estate was to be divested could in such case never occur; for until the grant was submitted for their approbation they could have no opportunity to disapprove it.

But that the final title was not to issue until the concession had become *definitive*, that is, until it had been approved, is clear, from the very terms of the eighth article.

"The definitive grant asked for, being made, a document signed by the governor shall be given to serve as a title to the party interested," etc.

It will be observed that this is the only document which, by the regulations, was at any time to be delivered to the party. Up to the time of its reception he might have remained in entire ignorance of the result of his application, and it was only by virtue of this document that judicial possession of the land could be given.

If, then, this document was his only title paper, and if, by law, it ought not to have been issued until the grant had, by approval, become definitive, it follows that no rights legally passed to him by virtue of any action of the governor previous to such approval; and that the delivery of the final *documento*, in advance of and subject to an approval, could not, in strictness, have vested any estate defeasible or other in the grantee.

It is, of course, not supposed that the action of the governor in acceding to the petition, or making his first decree of concession, was of no effect. It was the performance of a part, and a most important part, of the acts necessary to the execution of a grant of public lands. But it was not all that the law required. And until the concession had been approved it conferred no

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legal rights, any more than the nomination by the president of an officer to the senate confers, without confirmation by that body, a right to the office.

That it was the governor's duty to transmit the *expediente* to the assembly, and in case of their disapproval to the supreme government, is admitted.

But that fact serves more clearly to show that until such approval the proceeding remained exclusively in the hands and under the control of the government or granting power. That the applicant was not recognized as having yet acquired any rights, and might even, as before observed, have been ignorant of the action of the government. For otherwise the duty of perfecting his title by the confirmation of the assembly would have been imposed upon the petitioner.

The fact, then, that a grant was not submitted to the assembly is not charged upon the applicant as a fault. It was his misfortune that the proceedings necessary to pass the title were not had. But the circumstance that the governor neglected his duty in this respect can have no effect to impart a validity to the governor's preliminary action, which it would not otherwise possess.

But as the practice of issuing the final title in the first instance had so long and so extensively prevailed in the country, as many ranches had long been held and occupied under no other title, it seemed just to treat the reception of such a title as constituting an equity, which when followed and consolidated by an occupation and settlement, i. e., the rendering of the consideration contemplated by the colonization laws of Mexico, authorized the claimant to demand a confirmation by the United States.

But where the land had not been occupied, where the claim was founded solely on the fact that a title, unapproved by the assembly, had been delivered to the party, I was of opinion that he had no right to demand that this government should complete and make definitive that which the former government had left incomplete and inchoate.

The same conclusion was reached by another course of reasoning.

2. It cannot be denied that the assembly and the supreme government possessed the right to avoid, by refusing to approve, the act of the governor in making the concession. This was a sovereign and a proprietary right expressly reserved to them by the law, and by the terms of the document delivered to the party.

This right passed to the United States by the conquest, and could justly have been exercised in all cases where the Mexican authorities, had their government not been subverted, would have been at liberty to do so, i. e., where no equitable circumstances existed sufficient to bind the conscience of that government.

If, then, the Mexican government had found itself in the same condition as that in which the United States were placed; if lands which had been distributed by the league as almost without value had suddenly commanded enormously increased prices; if an immense immigration had set in of other Mexican citizens, who asked for, and were willing to buy, tracts of only one hundred and sixty acres instead of eleven square leagues; if the possession of such immense estates by single individuals had become contrary to the policy of her laws, the genius and habits of her citizens, and inconsistent with the

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rapid development of the resources of the country; if all these circumstances had existed, it may be declared with some confidence, that Mexico would have felt it to be not merely her right but her duty to exercise the power expressly reserved to her of avoiding the concessions of the governor, by refusing to approve them, in all cases where the grantee could allege no solid equities in his favor.

If, then, she had avowed her willingness to confirm and approve all such grants whenever on the faith of them the grantee had actually occupied and settled upon the land—that is, whenever he could show that the government had received the consideration which the policy of the former laws had required, it seemed to me that she would have done all that could have been claimed or expected from either her justice or her generosity.

The United States, succeeding to the rights and duties of Mexico, was at liberty to assume the same position, and had a right to demand, when called upon to recognize or confirm an unapproved grant, that the claimant should show occupation and cultivation of the land; not to avoid a forfeiture, as for breach of conditions subsequent in the grant, but as an indispensable part of the equities on which he could rely for a confirmation.

It was for these reasons that I considered that in all cases evidence of the fulfilment of the conditions of occupation and cultivation was indispensable, and that as occupation and cultivation constituted an essential element of the equities on which alone the claimant could base his application, no excuses for its omission, or explanation of the obstacles which prevented it, could be received; for the inquiry was not whether by neglect he had forfeited a vested right, but whether by performing certain acts he had acquired one, or, in other words, whether any equitable circumstances existed which bound the conscience of this government to confirm and complete the title.

Under this view, the questions presented under the Mexican colonization laws bore a close analogy to those debated and decided in the Louisiana and Florida cases, in which it was held by the supreme court that the performance of the conditions constituted the chief ground of the claimant's equity. The decisions of that court in those cases, I therefore considered as affording a guide and imposing a rule for the determination of land cases in California, and as the later decisions in the cases of Boisdoré, De Vilemont, Glen, etc., had rigorously required the exact fulfilment of the conditions, I felt obliged, reluctantly, to follow them; and in the case of Cruz Cervantes, to demand an occupation and settlement within the time limited in the grant—a decision apparently harsh and illiberal, but which, under the pressure of the later decisions of the supreme court, I thought myself compelled to make. But in the case of Fremont I entertained no doubt. Alvarado, the original grantee, had not only never occupied, but, so far as appeared, had never even seen the land for which he obtained a concession; and the obstacles which prevented a settlement existed at the time he applied for and procured the concession, and when he assumed the implied obligation to occupy and cultivate the land.

This land, unavailable and almost worthless under the Mexican government, had, chiefly in consequence of the American occupation, assumed an enormous value. It seemed to me, therefore, clear that the United States were in that case justified in refusing to recognize and perfect a claim in support of which

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the claimant could urge no other fact than the possession of a title-paper signed by the governor, but unapproved by the assembly or the supreme government.

But the supreme court overruled this decision. In its opinion, that tribunal seems to have adopted a view not precisely in accordance with either of those stated in this note.

It regarded the grant to Alvarado "as having given him a vested interest in the quantity of land therein specified;" but it proceeded to inquire "whether there was any breach of the conditions annexed to it, during the continuance of the Mexican authority, which forfeited his right and revested the title in the government." (*United States v. Fremont*, 17 How. 560.)

To determine this point, the supreme court further proceeded to inquire, whether there had been such unreasonable delay or want of effort on the part of Alvarado to fulfil as would justify the presumption that he had abandoned his claim before the Mexican power ceased to exist. The court then considered the various obstacles which had prevented a settlement, and the efforts made to effect one; and finding no unreasonable delay or neglect on the part of the grantee, confirmed the claim.

The language of the supreme court is not explicit as to the important point whether it regarded the unapproved grant of the governor as vesting a legal estate, liable to be divested by breach of conditions subsequent, or as passing merely an equitable interest which the United States were bound to respect, unless forfeited by unreasonable neglect to fulfil the conditions.

On the true construction of the opinion of the supreme court, in this respect, much diversity of opinion has prevailed. If the grant to Alvarado had been approved by the assembly, and had thus become complete and definitive by the concurrence of all the granting powers necessary to its execution, the conditions would have remained conditions subsequent, the breach of which would not forfeit the estate, but would have merely rendered it liable to denouncement—a formal proceeding or mode of enforcing a forfeiture well known to the Mexican law. But if no such proceeding had been taken, and the fee remained in the grantee, undivested by any act of the Mexican authorities, it would seem that the courts of the United States could have no power to inquire into and declare forfeitures which had accrued under the former government.

But inasmuch as the supreme court did enter into the inquiry whether the grantee had forfeited his rights by delay or neglect, in its judgment, unreasonable, it may be inferred that the court must have regarded the estate or interest vested in the grantee as an equitable interest, liable to be divested by unreasonable delays or neglects, which might constitute an equitable forfeiture.

But whatever may have been the views of the supreme court on this question, the practical result of the decision was most important. For under it, every claim for which a title-paper signed by the governor was exhibited was to be confirmed, unless the United States could show that there had been such unreasonable delay or neglect to fulfil the conditions as would create the presumption of an abandonment.

The views previously taken by this court had been commended to it, not

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more by their supposed technical accuracy than by considerations of their policy and practical advantage.

In deciding upon the genuineness of any claim to land under Mexican grants, the most, if not the only, satisfactory evidence which can be offered, is that furnished by the archives and afforded by the notorious possession and claim of ownership under the former government.

But, under the decision of the supreme court, I found myself unable practically to apply this latter test; for it was always easy, in cases of fraudulent or antedated grants, to locate the land in districts where it could readily be shown that Indian hostilities presented an insuperable obstacle to a settlement, and by parol proof of this fact and of some efforts or attempts at a settlement by the pretended grantees, to make the case precisely analogous to that of Fremont.

But this was not the most important practical consequence of the decision. A greater part of the grants by Pio Pico, which have obtained the sobriquet of "eleventh-hour grants," were executed but a few months before the final subversion of the Mexican authority. The grantees, in many instances, had not seen the land, and had never taken any steps to effect its settlement. Unapproved by the assembly, issued with evident signs of haste if not carelessness, never occupied or cultivated, they seemed to possess less equities than almost any other.

But these grants were precisely those with regard to which the court could not declare that they had been forfeited by abandonment.

The distracted condition of the country, and the impracticability of occupying the land, could always be alleged in excuse for the omission to do so. And independently of such excuses, it seemed impossible to presume an intention to abandon, from a neglect of a few months, when the customary period allowed for the purpose was one year.

The difficulty, therefore, of declaring the grant forfeited by abandonment increased in proportion to the shortness of the interval between its execution and the conquest of the country. And thus those grants, issued under the circumstances which have been mentioned, and which seemed more than all others destitute of real equities, were the most secure from the operation of the principle announced in the case of Fremont.

The book of *Toma de Razon*, for 1846, having been lost, and it being possible that the *expediente* in a particular case had met the same fate, the absence of archive testimony could not be regarded as conclusive evidence of the spuriousness of the title; and parol testimony, which it was not easy to contradict, however much it might be distrusted, was generally at hand to afford the requisite secondary proof of the contents of the lost *expediente*.

As proof of occupation could not be exacted, the court felt obliged to confirm these titles on proofs which amounted to little more than the verification of the signatures of the officers who executed them.

This result might, it is true, have been avoided by inquiring into the *bona fides* of the exercise of his authority by the governor. But an attempt to ascertain the motives of an officer, when performing an official act admitted to be legally within the limits of his authority, would in most cases prove abortive and unsatisfactory, and the conclusion reached would often be of too

speculative and conjectural a character to form the basis of a judicial determination. For these reasons, it seemed to this court, when these cases were first brought before it, clear, that as a matter of law, as well as on the grounds of policy, and as a means of preventing frauds, evidence of occupation and cultivation should in all cases be exacted, where a claim was made under a grant by the governor, unapproved by the departmental assembly.

UNITED STATES, APPELLANTS, v. EXECUTORS OF J.
L. FOLSOM, DECEASED, CLAIMING THE RANCHO
"RIO DE LOS AMERICANOS."

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

JUNE, 1859.

THE proceedings in this case were supplementary to final decree, and arose under the decision of the supreme court in the case of *The United States v. Fossat*, 21 How. 445, in which the supreme court determined that the power of the district court over the cause, under the acts of congress, does not terminate until the issue of a patent, conformably to the decree. The case was argued on the part of the United States by Mr. Edmund Randolph, and on the part of the claimants by Mr. R. Aug. Thompson and Mr. John J. Williams; and the discussion, generally, was participated in by many other members of the bar. The argument was made before both judges.

HOFFMAN, District Judge. A decree having been entered at a former term, confirming the claim in this case according to the boundaries mentioned in the grant, the appeal therefrom was, by consent of the district attorney, acting under the instructions of the attorney-general, dismissed. A motion is now made that the survey be brought into court to be examined and passed upon, and that a final decree be entered confirming to the claimants the lands so surveyed. This motion is made that the court may exercise the jurisdiction which, by the recent decision of the supreme court in the case of *The United States v. Fossat*, 21 How. 445, it is supposed to possess.

As the same proceeding may be taken in the case of every claim confirmed by this court, and as the jurisdiction the court is invited to exercise is one it was not by any one suspected to possess until the decision referred to appeared, an argument on the point was called for, in the hope that on a full discussion some of the difficulties and embarrassments which were felt on all sides to surround the subject might be removed.

It would be idle to conceal the fact that the questions presented and the doubts raised by the recent decision of the supreme court have been found, by this court and the counsel engaged in these cases, in the highest degree perplexing and embarrassing. No construction of the opinion of the supreme court was suggested by which all the difficulties could be obviated, or objections answered.

But, as the latest decision of the supreme court on a class of cases to us, in California, of vital importance, it is the duty of this court to endeavor to ascertain its true interpretation and the principles it establishes, and to adopt those principles in all cases to which they are applicable—without pretending to judge of their correctness, or to inquire, except in order to arrive at its meaning, how far previous decisions of the same court have been followed or overruled.

A brief statement of the case of *The United States v. Foscat*, as it was presented to the supreme court, is necessary to a correct understanding of its recent decision.

The original decree of this court confirmed the claim to land within four external boundaries mentioned in the decree. Three, only, of these boundaries were designated in the grant, but it appeared to this court that the fourth, or northern boundary, the existence and location of which was not disputed, was sufficiently indicated by the petition and the *diseño*, to both of which the grant referred, as well as by the name (*Capitancillos*) of the land granted. The land within these boundaries was found to exceed, by a fraction, the quantity of one square league. But as that quantity was described in the grant as "one league of the larger size, a little more or less, as is explained by the map accompanying the *expediente*," and as the supreme court in

the case of *The United States v. Sutherland* has declared, "that in Mexican grants a square league seems to have been the only unit of estimating the superficies of land," and that "if 'more or less' was intended in the grant it was carefully stated," it seemed to this court that the whole land within the boundaries, and including an excess of a fractional part of the unit of measurement, might reasonably be considered as intended to be conveyed by a grant which described the quantity as "one league, a little more or less."

The supreme court, however, decided these views to be erroneous, and held that as only three boundaries were mentioned in the grant, the fourth must be run for quantity, "which was the only criterion for determining that boundary furnished by the grant;" that the words "more or less" must be disregarded, "as having no meaning in a system of survey and location like that of the United States," and the precise quantity of one league be considered to be clearly expressed; that "if the limitation of the quantity had not been so *explicitly* declared," it might have been proper to ascertain the fourth boundary by referring to the petition, the *diseño*, and to evidence to ascertain what land was included in and known by the name of *Capitanillos*, but that no such reference or inquiries were admissible in that case, as the grant was free from ambiguity or uncertainty.

The supreme court accordingly affirmed the claim "for one league of land, to be taken within the southern, western, and eastern boundaries designated in the grant, to be located at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land claims in California by the executive department of the government."

It further ordered that the "*external boundaries designated in the grant* may be declared by the district court from the evidence on file and such other evidence as may be produced before it." (20 How. 427.)

The duty thus imposed upon it, this court thereupon proceeded to discharge. It was not suspected by the court, or suggested by any of the counsel, that that duty extended further than to "declare the three external boundaries men-

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tioned in the grant," *i. e.*, to designate them, unmistakably, in its decree, and to decide the vexed and only disputed question in the case, *viz.*, whether the southern boundary was the ridge known as the *lomas bajas*, or the *sierra* behind it.

The fourth boundary was, by the decision of the supreme court, to be determined by quantity alone; nor was this court required to declare it, for it was directed to declare only "the external boundaries *designated in the grant, within which* the land confirmed was to be located at the election of the grantee or his assigns, under the restrictions established by the executive department of the government.

A decree was accordingly made by this court, in which the three external boundaries mentioned in the grant were "*declared*" and described with as much precision as was possible without a survey; and the only disputed question in the cause as to what was the southern boundary (*viz.*, the *lomas bajas*, or the main *sierra*), was elaborately discussed and decided.

An appeal from this decree having been taken to the supreme court, it was dismissed as "improvidently taken and allowed." In its opinion, the court considers at large the nature and extent of the jurisdiction conferred on the district court by the act of March 3, 1851, and it decides that it possesses the power to inquire into and decide all questions of extent, locality, quantity, boundary, and legal operation which may arise in the cause. It further decides that as under the acts of 1824 and 1828, it was the duty of the surveyor to fulfil the decree of the court, and the court had power to enforce the discharge of that duty, so, under the act of 1851, the duties of the surveyor begin under the same conditions, and the power of the district court over the same cause "does not terminate until the issue of the patent conformably to its decree."

It would seem that the right and the duty of the district court to control and correct surveys by the surveyor-general, in all cases, could not be more explicitly declared.

But the supreme court goes further. The appeal was dismissed because this court had not entered a final decree. And this court is directed to "ascertain the external lines

of the land confirmed, and to enter a *final* decree of confirmation of that land." This direction, when taken in connection with the previous remarks of the court as to the power and duty of the district court, with respect to surveys, and also with the fact that this court had already declared the boundaries with as much precision as was practicable without a survey, can only mean that it must direct a survey to be made, and that such survey, when approved, must be embodied in a *final decree* of confirmation.

The decision of the supreme court is not based on the ground that this court had failed to execute any special mandate directed to it; for, as before stated, this court had been merely directed to declare "the external boundaries," not of the land confirmed, but "*designated in the grant, within which the land was to be located at the election of the grantee or his assigns, under the restrictions established by the executive department of this government.*"

As the three boundaries mentioned in the grant were not those of the land confirmed, but of the tract *within* which the one league confirmed was to be taken at the election of the grantee, subject to executive restrictions; and as this court was directed to declare only those three boundaries, it is clear that it performed all the duties enjoined by the supreme court, and that the case was not remanded because the court had failed fully to comply with the previous mandate of the supreme court. This fact is, by the supreme court itself, admitted in its recent decision. "The district court," it states, "*in conformity with the directions of the decree, declared the external lines on three sides of the tract claimed, leaving the other line to be completed by a survey to be made.*" (21 How. 447.)

The defect in the decree of this court must have been other than a non-conformity with the mandate of the supreme court. I have been unable to give any other construction to the opinion referred to than that this court, after declaring the three boundaries within which the league confirmed was to be taken, at the election of the grantee, and after the grantee had made his election, subject to executive restrictions, should have caused or permitted a survey

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to be made, and should have, by its final decree, confirmed the land so surveyed to the claimant.

Such being the clear purport of the decision, with regard to the case before the court, we are next to inquire to what extent the principles laid down are to be applied to the other cases.

The view generally taken by the bar regards the decision as laying down new rules by which all the land cases in California are to be governed; and the case is considered to decide that the decrees of this court, or of the supreme court, by which the authenticity and general boundaries of a grant are declared, are not "*final decrees*," but that the court is, in all cases, bound to direct a survey to be made, or to revise and pass upon surveys already made, and by its final decree to adopt a survey, and declare with precision the boundaries of the tract confirmed.

In support of this construction, reference is made to that portion of the opinion of the supreme court which decides that this court has, under the act of 1851, jurisdiction to determine all questions of extent, locality, and boundary, as fully as it was possessed by the courts under the laws of 1824 and 1828; to the declaration that the decrees of this court, hitherto supposed to be "*final*," were not final decrees under the judiciary act of 1789, and that the supreme court has entertained appeals from them by "*a relaxation of its rules*," rendered proper by the "*peculiar nature of these cases*;" and to the order at the close of the opinion that the appeal be dismissed as improvidently allowed, and that this court "*proceed to enter a 'final decree' of confirmation of the land confirmed.*"

If the language of the opinion of the supreme court be alone considered, it is perhaps not easy to avoid giving to it this construction. But the objections to it seem insurmountable. The thirteenth section of the act of 1851 prescribes the duties of the surveyor-general with regard to private land claims in California. It is declared to be his duty to "*cause all private land claims in California, which shall be finally confirmed, to be accurately surveyed, and to furnish plats of the same,*" etc. It is obvious, therefore,

that the final decree of confirmation must precede the survey, for, until the claim is finally confirmed, the surveyor is not required or authorized to act.

Again: The tenth section provides that in cases of appeals from the decisions of the board of commissioners, the district court shall proceed to render judgment, etc., and shall, on application of the party against whom judgment is rendered, grant an appeal to the supreme court, etc.

The authority to entertain such appeals is not explicitly given to the supreme court, but it results, by necessary implication, from the provisions above cited, and from the allusion in the fifteenth section to the "final decrees rendered by the said commissioners, or by the district or supreme courts of the United States." Unless, then, the decrees of this court which have been appealed from were, in some sense, "*final* decrees," it is not easy to perceive how the supreme court, by any relaxation of its rules, or from considerations of convenience, could have had jurisdiction to review them on appeal.

The fact that the supreme court has heretofore entertained, and will hereafter entertain, appeals from such decrees, must therefore be taken as proof that they regard those judgments and decrees as "final," and appealable under the act of 1851; though it appears that they are not final decrees under the judiciary act of 1789.

It is also evident that such decrees must be final decrees of confirmation, and the lands confirmed must be deemed "finally confirmed" within the meaning of the thirteenth section, for otherwise the surveyor would have no authority, nor could he be required, under the provisions of that section, to survey them. A contrary construction would lead to the most important and perhaps disastrous consequences.

It is well known that both the boards of commissioners, as well as both the district courts of this state, in common with all the gentlemen of the bar, have hitherto regarded the decrees by which the authenticity and validity, and the general boundaries of a claim have been declared, as "final decrees" of confirmation, under which the survey was to be made and a patent issued. In no case has a survey first

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been made and adopted or embodied in any subsequent final decree of confirmation.

In pursuance of such decrees, or similar ones, by the supreme court, many patents have issued.

If, then, it should be held that none of those decrees were final, and that the lands confirmed by them were not “finally confirmed,” in the sense of the act of 1851, it might follow that the patents have been irregularly issued, and are void as having been issued without authority of law.

There also may be cases in which no appeal has been taken from the decision of the board to the district court, or in which such appeals have been dismissed. If, then, the decisions of the board are not final decisions, or decrees, it is difficult to perceive how final decrees in those cases can be made. For the board has ceased to exist, and the district court may never have acquired jurisdiction over the cause. I am persuaded that a construction of the opinion of the supreme court involving such grave consequences, ought, if possible, to be rejected.

By referring to the cases cited by the supreme court in its opinion (viz., those of *Mitchell*, 15 Pet. 52, and *Ex parte Sibbald*, 12 Id. 488), as instances where the court directed, by its mandate, certain lands to be surveyed, and “maintained and declared the duty of the surveyors to fulfil the decree of the court,” it will be found that the decrees of the supreme court, requiring those duties to be performed, are expressly called, by the court itself, its “final decrees.”

In *Mitchell*'s case, the language of the court is—“on consideration whereof, this court is of opinion that the title of the petitioner, etc., is valid by the laws of nations, etc., and do *finally* order, decree, determine, and adjudge accordingly; and this court doth *in like manner*, order, adjudge, determine, and decree, that the title of the petitioner is valid to so much of a certain other tract as shall not be included in an exception hereinafter made;” and it proceeds to give particular directions for ascertaining the land so excepted.

In *Sibbald*'s case, after declaring the duty of the surveyor to fulfil the decree of the court, it orders “that the clerk of

this court make out a certificate of the *final* decree heretofore rendered in the case of *The United States v. Sibbald*; and, also, a mandate according to such *final decree*, the opinion of the court in that case and on these petitions." (12 Pet. 495.)

It appears, therefore, that the decrees of the supreme court by which the general validity of the claims in those cases was ascertained, and by which directions for a survey of certain tracts were given, were not only regarded by the court, but in terms declared to be *final decrees*; although some proceedings subsequent to and in execution of the mandates were required to be had by the inferior court and by the surveyor—the latter of whom, it may be remarked, was by the sixth section of the act of 1824, required to make a survey *after* a final decision in favor of a claimant.

That the decrees under which the surveyor, by the act of 1851, was required to survey, were not by the legislature intended to contain or embody a precise description of the land, as ascertained by a previous survey, is further evident from the fact that the same section confers upon the surveyor-general a certain provisional and *quasi* judicial authority to fix and settle disputed boundaries between adjoining ranchos.

But if the final decree of this court, under and in obedience to which he acts, has already fixed with precision every line of the claim which is confirmed, the surveyor can never exercise the authority which the law-makers have been at pains to confer.

It would seem clear, that the statute contemplated that the claim might be finally confirmed, and the surveyor called upon to survey it under a decree affirming its validity and fixing its general boundaries or those of the tract out of which the quantity confirmed should be taken, thus leaving to the surveyor the opportunity to exercise the authority with respect to interfering claims or boundaries which the law-makers intrusted to him.

On the whole, I incline to the opinion that the decision of the supreme court ought not to be construed as determining that none of the decrees heretofore rendered by the

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boards, the district courts, and by itself, are final decrees; and that final decrees, defining with precision the boundaries of the land, must in all cases be entered.

I am aware that this view is apparently in conflict with some expressions in the opinion; but it has seemed less open to objections than the other construction suggested—to adopt which would involve as consequences:

1. That no final decree has ever yet been made in any land case.

2. That the survey is to be made by the surveyor-general of claims *not* finally confirmed, but which are *finally* confirmed only after survey; when the language of the statute is express, that the claims to be surveyed by him are those which shall be “finally confirmed.”

3. It would leave the regularity and even the validity of all patents, heretofore issued, open to grave doubts.

4. It requires us to suppose that the supreme court have treated as *final*, and therefore appealable, decrees which were not final—and this by a relaxation of their rules, which, as the law only gives to that court jurisdiction of appeals from final decrees, it cannot be supposed that they would have felt themselves at liberty to make.

Assuming, then, that the decrees of this court, heretofore rendered, are to be deemed “final,” in such a sense as that an appeal from them can be taken, and that the surveyor-general, under the thirteenth section of the act of 1851, may be required to survey them, we are next to inquire what further jurisdiction over the case this court is, by the opinion under examination, declared to possess.

That the case of Fossat was remanded in order that a survey might be made, and a decree embodying such approved survey entered, is clear.

It may be said, however, that such a proceeding is merely decided to be necessary in that particular case—and that it should not be taken except in cases precisely similar to that of Fossat, viz., where the question of boundary or location has been raised and decided in the regular course of the suit, and where the supreme court has

remanded the cause, in order that the location might be fixed. But this interpretation of the opinion is inadmissible.

It has already been shown that this court had performed every duty required of it by the previous decision of the former court, and that the cause was not remanded because this court had failed to execute the previous mandate in the case.

That the supreme court have, in their opinion, laid down principles generally applicable to all cases, I think, is evident.

In the first place, they discuss and decide the point whether this court has, by the act of 1851, any authority to decide questions of extent, location, and boundary. Such questions they declare may be "essential in determining the validity of a claim"—and the power to decide upon "validity" involves the power to decide upon all questions of boundary.

Secondly. In answer to the objections that this court has no means to ascertain the specific boundaries of a confirmed claim, and no power to enforce the execution of its decree, the supreme court decides that this court has such power, and that it is the duty of the surveyor to fulfil the decree of the court; and the court declares, "that the power of the district court over the cause does not terminate until the issue of a patent conformably to its decree."

I am aware that in a previous opinion, delivered in the same case (20 How. 425), the same court declared that "the jurisdiction of the board of commissioners in the first instance, and the appellate jurisdiction of the courts of the United States, are *limited* to the making of decisions on the validity of the claim *preliminary to its location and survey by the surveyor-general of California*, acting under the laws of the United States."

No mode of reconciling this declaration with any construction of the last decision in the case of Fossat, was suggested at the bar or has occurred to either of the judges. It must, therefore, be treated as overruled by the later case.

As, then, "the power of this court over the cause does not terminate until the issue of a patent conformably to its decree," and as it has jurisdiction to determine all questions of extent, location, and boundary which may arise, it is the duty of the court to exert this power, and to exercise the jurisdiction at the instance of a suitor.

I therefore think, that in all cases where a decree of confirmation has been entered, and a survey under it has been made, on which a patent is about to issue, which survey is objected to as erroneous, it is the duty of the court to direct the survey to be returned to it, that it may hear and determine the questions of location and boundary which may be raised.

In coming to this conclusion, I have not overlooked the great difficulties of reducing it to practice.

The first and most perplexing question is that of parties. By whom can objections to a survey be made? Every party entitled to object to the survey must have a right to take testimony in support of his objection, and a right to appeal from the decision of this court to the supreme court.

It is, therefore, of the utmost consequence to determine who are the proper parties to the proceeding.

At first blush, the answer might seem obvious, viz.: That the parties to a proceeding to correct a survey, are only the original parties to the suit, viz., the United States and the claimant. But the solution of the difficulty is by no means so easy as it might appear. During the long period which has elapsed since the claims were first filed before the board, many changes of interest have occurred. Suppose, then, that the original claimant has parted with all his interest, or it has been sold on execution. He may have no motive to dispute any location, however erroneous—and he may not be disposed to allow the use of his name to the present owner. Cannot the latter be heard to object to the location of what has become his exclusive property? Or suppose that the original claimant, though really entitled to only two leagues to be taken from a tract the boundaries of which contain four leagues, has, through error or fraud,

sold out four leagues to two purchasers—two leagues to each. He, therefore, has ceased to have any interest in the controversy. The real contest is between the purchasers, each of whom desires that the patent may cover the land conveyed to himself. Is neither to be heard? or only he who has the good fortune to obtain the use of the name of the original claimant. The United States may have no objection to the survey. It will, therefore, be confirmed, unless objected to on the part of the claimant. Which of the parties, in the case supposed, has the right to object? If both have, what limits can be assigned to the rights of intervention?—for in some cases, the grantee may have sold to hundreds of purchasers.

Again: If the right of both sub-grantees to be heard in the case supposed, be admitted, ought not persons so immediately interested in the result of the inquiry to be heard, notwithstanding that the original claimant may not have sold out his entire interest? The part retained by him may be so situated that any possible location of the claim will include it. He has, therefore, no interest to object—on the contrary, he desires a patent to issue without delay. But the purchasers under him have a direct and vital interest in obtaining a location such as will cover the tracts conveyed to them respectively. Is the court to refuse to hear them?

Again: Grants, in most instances, have as one or more of their boundaries the lands of other parties. The court, in fixing the location of rancho "A," necessarily determines one of the boundaries of rancho "B," by which it is bounded. Ought not the owner of the latter to be heard to show what his boundary is? If he is not, he is excluded on the ground that the suit as to the boundaries of his neighbor determines nothing as to his rights. The result might thus be, that when the second rancho is before the court for location, the evidence in that case would compel it to adopt a boundary line different from that fixed in the first case.

If the second location were the correct one, the claimant in the first case would lose his land. It would then be too

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late to extend his lines in another direction so as to give him the quantity mentioned in his grant.

But the boundaries of rancho "B," in the case supposed, may involve an inquiry into the true location and boundaries of rancho "C," and several other circumjacent tracts. How then can the court, hearing each case separately, unassisted by topographical maps, and unable, except in rare instances, to visit the lands, hope to arrive at any satisfactory conclusion?

Again: Two or more grants are often made within the same general boundaries—an original, or first grant, and one or more *sobrante* grants. Ought not both grantees to be heard, that the court may, if possible, locate each of the grants, so as to satisfy the just claims of all the grantees?

If all these parties have the right to appear, take testimony, and to appeal, it may reasonably be apprehended that the litigation upon which we are entering will be far more protracted than that which has already occurred respecting the validity of the claims.

If these parties are excluded, how can justice be done? When we consider the immense interests involved in the location of grants, the vague and indeterminate character of the boundaries mentioned in the grants and delineated on the *diseños*, the opportunity afforded for plausible objections to any location which can be made, and how impracticable it is for a court to learn through depositions the natural features of a country it has never seen, and of which no topographical map is exhibited, and therefore how difficult it will be for it to render any decision in which the parties will acquiesce, or which will be satisfactory to itself, it may well be doubted whether the evident anticipation of the supreme court that few cases will re-appear before it on appeal will be realized.

Before dismissing this subject a further observation may be made. The settlers claiming to hold under the United States are heard, if at all, through the district attorney. In many cases they may have just objections to a location which has been made so as to improperly include their

claims. In many cases they may object to any location in order that the issue of a patent may be postponed, and that they may continue to enjoy the use of the land.

The number of locations to be passed upon may be some hundreds. The district attorney, like the court, is unacquainted with the topography of the country. How can he determine, when objections supported by affidavits are presented to him, which he ought to urge in the name of the United States, and which he ought to refuse to make, as vexatious and intended for delay? May he not be driven to adopt the rule to make objections which seem plausible and are supported by an appearance of proofs? In such case it is to be feared that the jurisdiction the court is about to exercise may be as often the means of delaying indefinitely the issue of a patent to a rightful claimant, and of plunging him into a new and protracted litigation, as of correcting errors of the surveyor-general in locating claims.

For these reasons I would gladly have declined the jurisdiction I am urged to assume.

Under the recent decision of the supreme court I have not felt at liberty to do so.

With regard to the particular case more immediately under consideration, it follows, from what has been said, that this court cannot now proceed to examine the survey which has been made. The court, as already stated, regards the decree heretofore made as *final*, in a sense to authorize an appeal from it, or a survey of the lands as finally confirmed. It is not, however, exhaustive of its power over the case, for that does not terminate until the issue of a patent. The court does not therefore proceed, as of course, to enter a decree for the land as surveyed, which would be necessary if the decree heretofore made were only interlocutory.

But it will hear objections to the survey. None are made in this case. The survey originally made is satisfactory to the parties now moving to bring it before the court. That survey has been disapproved at Washington by the executive officers of the government, and a new one directed to

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be made. When that shall have been done, the parties now moving may make their objections and bring the questions involved before the court.

NOTE.

Since the foregoing decision was rendered, Judge Hoffman has decided (in the case of *The United States v. John Bidwell*, claiming the Rancho "Arroyo Chico") upon the rights of settlers with respect to their standing in court. Judge Hoffman says:

"In this case, as in all other cases, all persons who allege that any of the land included in a survey of a rancho is public land of the United States, must urge their objections in the name of the United States and through the district attorney. To that officer is committed the duty of seeing that no public land is improperly embraced within a survey of a private claim. When he has no objections to interpose, the settler cannot be permitted to intervene in the proceeding. When he settled upon that land, and, notwithstanding that it was claimed under a Mexican title, chose to assume it to be public land, he was aware that the United States would assert her rights through her proper officers, and that the judgment of the courts, declaring that the land was not public but private land, would be final and conclusive on the rights of the United States and all claiming under them.

"When, therefore, the United States, through her officers, admits that the survey is properly made, or declines to make objections to it, no settler can be heard to contest it."

UNITED STATES v. M. C. V. DE RODRIGUEZ ET AL.

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

NOVEMBER 26, 1864.

By the Court, HOFFMAN, J. This case comes up on exceptions to the official survey filed on the part of the United States and of the neighboring rancheros. To understand correctly the question raised, a brief review of the proceedings to obtain the grant, and those which resulted in the confirmation, is necessary.

The original petition of Buelna asked for the place called San Francisquito, "to the extent of eight suertes of two hundred varas square each, making sixteen hundred, according to the reglamento of colonization." The language of the decree of concession, and of the grant, is somewhat involved; but the land is clearly enough described, as eight suertes of two hundred varas each, including the land lying between the Chemisal and the San Francisquito creek, and extending from the upper crossing of the road leading to the

sierra to the road leading from Santa Clara to San Francisco, known as the middle road.

The third condition describes the land granted as of the extent of two thirds of a league, a little more or less. On the *diseño* attached to the *expediente*, the boundaries mentioned in the grant are clearly exhibited. On the north is the brook; running parallel with it, and at a short distance to the south, is the Chemisal. On the west is the road to the sierra, which crosses the brook, and on the east is the middle road. It would seem, however, that the grant was not intended to extend as far as this road, for a little to the west of it a line is drawn from the Chemisal to the brook marked "raya," indicating that it is the eastern boundary of the tract. On the corner of the *diseño* is a note, stating that the land is of the extent of eight suertes.

I have been unable to understand the meaning of the clause in the third condition, stating the land to be of the extent of two thirds of a league. If the eight suertes asked for were to be each two hundred varas square, the total area of the tract would be three hundred and twenty thousand square varas. A square league is five thousand varas square, and its area is twenty-five millions of varas.

Parol testimony was taken before the board of land commissioners to show that a juridical possession was given of the land by metes and bonds. No record of the act of possession was produced, but the board confirmed the claim according to the juridical possession, as sworn to by the witnesses. Its decree sets forth particularly the boundaries of the tract, and states the extent of land confirmed to be "two thirds of a league, a little more or less." This decree was affirmed on appeal to this court, the United States offering no opposition. The tract thus described extends to a considerable distance to the south of the Chemisal, between which and the San Francisquito creek both the decree of concession and the grant describe the land as situated. It also extends to the eastward beyond the line marked "raya," which the *diseño* designates as a boundary in that direction. In the official survey, the calls of the decree seem to have been wholly disregarded, as also

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the indications of the map, which the claimants themselves presented to the board as a correct survey of the tract of which judicial possession was given. The most that the claimants can ask for, is that the boundaries called for in the decree be followed. I cannot perceive, therefore, how the official survey can be sustained.

It is objected, however, on the part of the owners of the adjoining rancho, confirmed to the heirs of Mesa, that the dividing line between the ranchos has already been fixed in a proceeding to which the present claimant was a party, and that that line must be adopted in fixing the boundaries of the claimants' land, notwithstanding that it is a different line from that described in his decree of confirmation. It appears that when the Mesa rancho was surveyed, objections to the survey were filed, and the proceedings required by the act of 1860 were taken. The owners of the Rodriguez rancho intervened, and were heard; and the court, after due deliberation, located the Mesa rancho as appeared to be just under the decree of confirmation and the evidence in the case.

On the part of the owners of the Mesa rancho, it is contended that the location of the common boundary between the ranchos has thus become *res adjudicata*, not only as against the United States, but as against the owners of the Rodriguez rancho, who were parties to the proceeding, and who might have appealed if dissatisfied with the decree; that the object and effect of the proceedings under the law of 1860 were to settle disputes of this nature between contiguous proprietors; and that, inasmuch as the Mesa rancho has been finally located, the Rodriguez rancho cannot be made to include a part of the same land, unless overlapping patents be issued, which is never done by the United States.

On the part of the present claimants, it is urged that the final decree obtained by them gives a definite location to their land; that it describes the boundaries clearly and specifically; that it in terms adopts the judicial measurement testified to in the cause; that their rights are thus fixed and determined by the decree; and that the power of the court, under the act of 1860, is limited to an inquiry,

whether the survey is in accordance with the terms of the decree.

It is also urged that the intervention in the case of Mesa had for its object to prevent the boundaries of that rancho from being so fixed as to include any portion of the land already confirmed to the claimants, and thus to avoid future dispute and litigation; that although this object was not attained, yet that their own rights under their decree were not waived by them; that the adjudication in that suit only fixed the boundaries of the Mesa rancho—it did not, and could not, affect the boundaries of the Rodriguez rancho, already established by the decree of confirmation, and which was not then before the court; and that they are now entitled to have their land surveyed as described in their final decree of confirmation, notwithstanding that they include lands already embraced in the Mesa survey.

It will be perceived that the question thus presented is difficult and important.

Since the argument of this cause, the opinion of the supreme court, in the case of *Fossat v. The United States*, has been received. Before proceeding to inquire how far the decision in that case disposes of the questions raised in the case at bar, I deem it due to myself to correct some misapprehensions, as to matters of fact, into which both the counsel who argued the cause and the supreme court appear to have fallen.

The opinion, after detailing the previous history of the cause up to the time when the survey was ordered into this court, under the provisions of the act of 1860, states that the district court entered an order reforming the survey as to the eastern line.

“This direction,” the court observes, “not only reformed the survey of the tract, as made by the surveyor-general, but reformed the decree itself of the court, entered on the eighteenth of October, 1858, in pursuance of which the survey had been made. The court assumed that the survey and location of the tract were not to be governed by the decree, but on the contrary, that it was open to the court to revise, alter, and change it at discretion, and to re-

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quire the surveyor-general to conform his survey and location to any new or amended decree—for certainly if it was competent to change the eastern line from that settled in the decree, it was equally competent for it to change every other line or boundary as there described and fixed.”

“Now it must be remembered that this decree of the district court, designating with great exactness this eastern line—with such exactness that the surveyor-general had no difficulty in its location—was entered in pursuance of and in accordance with the mandate of this court, and by *which that court was instructed, at the time of the dismissal of the appeal, that the three external lines declared in it were in conformity with the opinion of this court*, and that the other line—the north line—only remained to be completed by a survey to be made, and that this line was to be governed by quantity, which quantity had been previously determined.”

“This radical change, therefore, of the eastern line of the tract, involves something more than a change by the court of its own decree; it is the change of a decree, entered in conformity with the mandate of this court.”

If it be true, as here stated; that a subordinate judge has not only radically changed his own decree, without color of authority, but that the decree so changed was one “in conformity with the opinion” of the superior tribunal, his action would deserve stronger language of censure than the supreme court has used.

I shall show, however:

1. That no decision as to the eastern line of the Fossat claim was ever made by this court until its last decree in the proceedings had under the act of 1860; that the questions in regard to the location of that line were never until then argued or submitted to the decision of the court; and further, that under the rulings of the supreme court, this court had, prior to the act of 1860, no jurisdiction to locate and establish that line.

2. That this court had no reason to suspect that any supposed decision with regard to that line had ever been affirmed, or in any way passed upon by the supreme court; that when the location of the eastern line was, in a pro-

ceeding taken under the act of 1860, for the first time submitted to this court, it was not suggested by any of the counsel that the supreme court had affirmed, or expressed any opinion whatever upon, the correctness of the location of even the southern line, which had been argued and decided by this court, still less upon the location of the eastern line, which had not been argued, and which, it was universally conceded, could not be determined in a proceeding to which the adjoining owner was not a party.

3. That even if the location of the eastern line had been determined by this court, and if that determination had been affirmed by the supreme court, there were good reasons for believing that, under the act of 1860, it was the duty of the court, on the intervention of Berreyesa, then for the first time heard in the cause, to determine the line according to justice and right, and irrespective of any decree obtained by either party in a proceeding between himself and the United States.

I. By the act of March 3, 1851, the board of commissioners and the courts on appeal were empowered to decide only upon "*the validity*" of land claims. This act differed from the laws of 1824 and 1828, in withholding the power, conferred by those acts on the courts, of deciding "all matters relative to the extent, locality, and boundaries" of the claims. The controversy was strictly limited to the United States and the claimants, and third persons were not permitted to intervene. But the law provided that their rights should not be affected by the decrees or patents under them. The duty of locating finally confirmed land claims was confided to the surveyor-general; and with respect to interfering or conflicting claims, he was authorized to decide in the first instance, leaving to the parties interested the right of recourse to the ordinary tribunals.

That such was the true construction and effect of the law, was explicitly decided by the supreme court. In *United States v. Foshat*, certain adversary claimants had been permitted to appear, and adduce evidence in the name of the United States.

The supreme court says:

"The opinion of the court that the intervention of

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adversary claimants, in the suit of a petitioner under the act of 1851, for the confirmation of his claim to land in California, is a practice not to be encouraged. The board of commissioners was instituted by congress to obtain a prompt decision on the validity of private land claims, to enable the government to distinguish the public land from that which had been severed from the public domain by Mexico. And that it might fulfil the obligation assumed at the time of the cession of California, to secure and protect the property of its inhabitants.

“The jurisdiction of the board of commissioners in the first instance, and the appellate jurisdiction of the courts of the United States, *is limited to the making of decisions on the validity of the claim, preliminary to its location and survey by the Surveyor-general of California*, acting under the laws of the United States. This officer is required to survey and furnish plats of the claim that may be confirmed.

“*In reference to interfering or conflicting claims, he is authorized to decide by adopting the lines agreed to by the claimants, and in the absence of an agreement to follow the rules of justice.*

“The acts of congress provide that neither the decisions of the commissioners, nor of the district or supreme courts, nor of the surveyor-general, shall preclude a legal investigation and decision by the proper judicial tribunal between parties having such interfering claims, * * * and a patent under the act is only conclusive between the United States and the claimant, and does not affect third parties. (9 Stat. 631; 4 Stat. 492.) The language and policy of these enactments *limit a controversy like the present to the United States and the claimants.*” (20 How. 425.)

This decision, though made subsequently to the first decree of this court, in the Fossat case, merely affirmed the correctness of the construction previously given by the board, the court, and the bar, to the provisions of the statute.

When, therefore, the case of Fossat was presented, it was contended by the district attorney that the court had no authority whatever to fix any of the boundaries of the tract, not even those between it and the public land, but that *all*

questions of boundary and location must be determined by the surveyor-general. It was considered, however, by the court that an inquiry into the validity of a claim necessarily involved, to a certain extent, inquiries into its location and extent, and that when a question arose between the United States and the claimant, as to the identity of a natural object called for in the grant, and which formed the boundary between the land granted and the public land, it was the duty of the court to hear and determine the dispute. The correctness of this view was explicitly affirmed at a subsequent stage of the cause by the supreme court. (*United States v. Foscat*, 21 How. 449.)

But, with regard to the dividing lines between the claimant and a neighbor, when the controversy related to lands admitted to belong to one or the other, and therefore private, it was universally conceded that the court had no jurisdiction to determine it, especially as the adjoining owner had no right to intervene in the suit, and no decision of the disputed boundary could affect his rights. The evidence and arguments in the cause were, therefore, exclusively directed to the question raised with regard to the southern boundary.

The location of the eastern line was not disputed or discussed, nor was any question respecting it submitted to the court. So far as the record disclosed, there was nothing to show that the location of that line was in controversy.

The court was aware, however, that with regard to that line a dispute in fact existed. This dispute was understood to arise from a supposed repugnancy between the description of the line contained in the grants and the delineation of it on the *diseño* of Berreyesa.

The decree of the court, therefore, after determining the southern boundary, describes the eastern line in the language of the grants, but it specially refers to and adopts the dotted line marked on the *diseño* of Berreyesa as indicating the boundary between the ranchos. And it was supposed that by these means all questions between the claimants, under Larios and Berreyesa, would be left open and undecided. Such, even yet, appears to me to be the fair construction of the decree.

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The case having been appealed, the decree of this court was reversed on points hereafter to be referred to, and the cause was remanded to this court with instructions "to declare the three external boundaries designated in the grant, from the evidence on file and additional evidence to be taken." It is in the opinion then delivered by the supreme court, that the declarations above cited, with regard to the jurisdiction of the court and the determination by the surveyor-general of lines between conflicting and interfering claims, are found. Any doubt which this court might have entertained as to its authority to determine, in the absence of Berreyesa, the disputed line between the ranchos, was dissipated by the very explicit language of the supreme court.

On the return of the cause, further evidence was taken, and counsel were heard. The location of the eastern line was, as before, not debated, and the arguments related solely to the location of the southern line. The court, in its decree, reaffirmed its previous decision with regard to that line. The eastern line was described as before, in the language of the grants, and the dotted line on the *diseño* was again carefully referred to and adopted, as indicating the boundary between the ranchos. An appeal having been taken from this decree, it was held by the supreme court that the decree was *interlocutory*, and not *final*; that the northern line, which was merely described as a line to be run for quantity, should have been fixed upon the ground by a survey. The appeal was therefore dismissed.

The cause having been remanded to this court, no further proceedings in it were had until after the passage of the act of 1860, when the counsel for the claimant moved for and obtained an order directing the surveyor to survey the tract, and to give notice according to the provisions of that act, of the approval of the plat and survey. This was done, and the survey was ordered into court on the application of the Berreyesas, who thus for the first time became parties to the cause. Their own rancho had also been surveyed, and the same dividing line adopted by the surveyor as in the Fossat survey. This survey was also on their application ordered into court, and the Quicksilver Mining Company,

claiming under Larios, and the New Almaden Company, intervened and became parties to the proceeding. All parties being thus before the court, evidence was taken and argument heard relative to the location of the eastern line. The location of that line was then for the first time decided by the court.

It was not suggested by any of the counsel that this question had ever before been submitted to or passed upon by the court. They knew the fact to be otherwise. Nor was it contended that the language of any previous decree in the suit of *Fossat v. The United States* imported a decision of the question. It was not, to my recollection, hinted by any one, nor did the idea occur to the court, that any decision of this court supposed to determine that line had in any way been affirmed, or even considered, by the supreme court. The question was on all sides treated as still open and undecided, and this court proceeded to determine it, without the remotest suspicion that its action was irregular or unauthorized. Its determination, though then for the first time judicially declared, was in accordance with the opinion it had entertained from the time when, in an ejectment suit brought long before in the circuit court, the counsel for the New Almaden Company had contended for the location of the eastern line as claimed by the representatives of Larios.

That opinion has been adjudged by the supreme court to be erroneous; but as this court has been supposed to have not only departed from its decrees, but to have changed its opinions, I shall be pardoned, I trust, for stating, with all deference to the superior judgment of the appellate tribunal, that notwithstanding all that has been said, I am still unable to discover the error of the final decision of this court by which the line between the ranchos was determined. I believe that the history and nature of the dispute between the grantees—their evident and necessary object in fixing upon the line, and, above all, the plain and palpable delineation of it upon the *diseño*, unmistakably show the intention and understanding of the parties. That to this evidence, the words of the grants, which are very

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obscure, and which were intended to describe a line already agreed upon by the parties, and delineated on the *diseño* as a substitute for an actual marking on the ground, ought to yield; that to carry out the principal and controlling intention of the parties, either the call in the grants for the “falda,” or that for “a straight line,” must be sacrificed—which of them, was practically immaterial, for they were both of equal dignity; but both were, in my judgment, subordinate to the mute but visible call of the *diseño*, which showed how the line was to be drawn, where it was to strike the sierra, and how the valley was to be divided between the disputants.

On these grounds I believe that Castellero, who denounced the mine, Pico the alcalde, Berreyesa himself, and, so far as we know, the neighbors and contemporaneous inhabitants of the country, were not all mistaken, when without doubt or dispute they asserted the recently discovered quicksilver mine to be “on the lands of the retired sergeant José Reyes Berreyesa.”

But whatever may be thought of the correctness of these views, it is certain that the location of the eastern line was never adjudicated by this court until its last decree was made—and that in that adjudication, whether erroneous or not, it did not revise, or change, or alter, as has been supposed by the supreme court, any previous decision of its own, with respect to the location of that line.

II. I shall now show that this court had no reason to suspect that any decree supposed to determine that line had ever been affirmed by, or declared to be in conformity with, “the opinion of the supreme court.”

The first decree of this court confirmed the title of the claimant to the westerly portion of the valley described in his petition as the Cañada de los Capitancillos.

This valley is on the north and south bounded by parallel ranges of hills, and the tract confirmed was limited on the west by the Arroyo Seco, and on the east by the line agreed on between Larios and Berreyesa, the latter of whom had obtained a grant for the easterly portion of the valley.

The third condition of the grant declared the land to be

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of the "extent of one square league, a little more or less (*poco mas ó menos*), as explained by the map accompanying the *expediente*."

In the grant, only three boundaries were mentioned, viz.: the southern, the western, and the eastern. But the *diseño* to which the grant referred plainly represented the range of hills which formed the northern limit of the valley, while the designation in the petition of the land solicited as the valley of the Capitancillos and the situation of the petitioner's house, seemed to indicate unmistakably that the tract asked for and granted was the cañada or valley extending from the Arroyo Seco on the west to the land of Berreyesa on the east.

On the argument, the only disputed boundary was the southern. It was claimed by the United States and the counsel for the New Almaden Company, that the "sierra" called for in the grant was the base of a range of foot-hills, or "*lomas bajas*;" while the claimant contended, that by that term the chain of high mountains behind and parallel to the "*lomas*" was evidently referred to.

The court adopted the latter view.

There was, therefore, confirmed to the claimant the valley lying between the sierra on the south and the pueblo hills on the north—and extending from the Arroyo Seco to the agreed line of division between the ranchos. Its extent was, as the grant declared, a little more than one square league; but how much more could not be ascertained until the dispute with Berreyesa, in regard to the dividing line, should be finally settled.

This decree was reversed by the supreme court on appeal. It was held by that court, that, as only three boundaries were mentioned in the grant, there "was no other criterion for determining the fourth, or northern boundary, than the limitation of the quantity as expressed in the third condition." The words "*poco mas ó menos*" were rejected, as "having no meaning in a system of survey and location like that of the United States," and the court observed: "*If the limitation of the quantity had not been so explicitly declared, it might have been proper to refer to the petition and diseño,*

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or to have inquired if the name 'Capitancillos' had any significance as connected with the limits of the tract."

The grant to Larios was therefore declared to be "for one league of land, to be taken within the southern, western, and eastern boundaries designated therein, and to be located at the election of the grantee, or his assigns, under the restrictions established for the location and survey of private land claims in California by the executive department of this government.

The district court was directed "to declare the external boundaries *designated in the grant*, from the evidence on file, *and such other evidence as may be produced before it.*" (20 How. 427.)

It will not, I presume, be contended that this opinion, or the mandate in pursuance of it, in any respect constituted an affirmance of the decision of this court with regard to boundaries.

The location of the southern boundary, which was the principal question discussed in the court below, is not alluded to; no intimation is given whether, in the opinion of the supreme court, the "sierra" mentioned in the grant was the range of low hills or the mountain chain behind it, and the cause is remanded, with directions to this court to declare the three boundaries mentioned in the grant from the evidence on file, *and such other evidence as may be produced*, clearly showing that the supreme court intended to keep the question as to the location of those boundaries open and undecided, and that they supposed it might be elucidated by further testimony.

On the return of the cause, further testimony was taken, and the location of the southern boundary re-argued. This court reaffirmed its previous judgment with respect to that line, and after describing, as has been stated, the eastern line in the language of the grants, with a reference to and adoption of the dotted line on the Berreyesa *diseño*, directed, in the very language of the supreme court, the northern line to be run for quantity "at the election of the grantee or his assigns, under the restrictions established for

the location and survey of private land claims in California by the executive department of this government."

It is evident that no more precise decree could have been made without an actual survey, which it had not, up to that time, been supposed this court had power to order, nor could a final survey have been made at that stage of the cause, for the northern line being required to be run for quantity, it obviously could not be run until all the other lines were established, and no establishment of the eastern line or disputed boundary between Larios and Berreyesa could be made in a proceeding wherein, by the express decision of the supreme court, the latter was not permitted to intervene, and the decree in which could have no effect upon his rights.

It will also be observed that the refusal of the supreme court to recognize the natural boundary of the valley on the north, as the northern limit of the tract, and the direction to this court to locate the league "within" the three other boundaries, and to run the northern line for quantity at the election of the grantee, necessarily compelled this court to locate the grant, in great part, among the hills toward the south.

If, then, there be in the final survey the anomaly of locating a grant for a valley among the mountains, excluding the valley solicited, it has been the direct and inevitable result of the instructions given to this court by its superior.

From the second decree of this court, an appeal was again taken, and a decision as to the disputed southern line was on all hands confidently expected.

That expectation was not fulfilled. When the cause came up, a doubt was suggested by the chief justice, "whether there had been a final decision by the district court under the mandate, and whether the appeal ought not to be dismissed on that ground."

On this suggestion a motion to dismiss was made and argued.

The merits of the case do not appear to have been alluded to in the argument of counsel. They certainly are not referred to in the opinion of the court.

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It was decided that the decree appealed from was not a final decree, and the appeal was dismissed.

In the opinion, the court, after reciting its previous direction to this court to declare the external boundaries designated in the grant, from the evidence on file, and such further evidence as might be produced, says: "The district court, in conformity with the directions of the decree, declared the external lines on the sides of the tract, leaving the other line to be completed by a survey to be made. From the decree in this form the United States have appealed."

"A motion has been submitted to the court for the dismissal of the appeal, because the decree was interlocutory, and not final." (21 How. 447.)

This statement of the action of this court is in all respects accurate. I am to this day unable to perceive what else, or what more this court could have done under the mandate and under the law as it had been up to that time expounded by the supreme court.

But I must be permitted to express my profound astonishment at discovering that this simple sentence, which states the action of this court under the previous mandate, has been considered as amounting to an affirmance by the supreme court of the correctness of the location, not only of the southern line, which had been discussed and decided, but also of that of the eastern line, which had never been argued, which was an interfering claim, declared by the supreme court, to be left by law to the decision of the surveyor-general, and which it seemed repugnant to reason and justice to decide finally, in any controversy to which Berreyesa was not and could not be a party.

But, even with respect to the southern line, it was not for a moment suspected by this court, nor was it even suggested by counsel, that the supreme court, on a preliminary motion to dismiss an appeal, without hearing argument on the merits, without alluding to the grave and difficult questions involved, meant, at the moment it was deciding the decree appealed from to be interlocutory and not final, and thus, in effect, declaring itself without jurisdiction, to

finally pass upon and determine every question involved in the case.

That such was its intention I am bound to conclude from its recent opinion. On that supposition alone can the observation above cited, that “the change of the eastern line by this court involves something more than a change by that court of its own decree—it is the change of a decree entered in conformity with the mandate of this court”—be accounted for.

I have thus, I believe, established beyond all doubt or controversy, that if this court has changed a decree, the correctness of which had been affirmed by the superior tribunal, it has done so unintentionally and unconsciously—and under circumstances which did not suggest nor could they reasonably have suggested to either court or counsel the construction which has since been given to the opinion and mandate of the supreme court.

III. I shall now show that if the eastern line had been fixed by this court, and even if that decision had been affirmed by the supreme court in a suit between Fossat and the United States, there were good grounds for believing that when, under the provisions of the act of 1860, Berreyesa, for the first time, became a party to the cause, and when under the same act his own rancho was before the court for location, in which proceeding the claimants under Justo Larios intervened, it was the right and duty of the court to determine in both suits the true location of the dividing line between the ranchos, irrespective of any decree obtained by either claimant in a suit to which his neighbor was not a party.

To fully understand the question here presented, a precise notion must be obtained of the circumstances which led to the passage of the law of 1860.

It has already been stated that the supreme court dismissed the appeal from the second decree of this court on the ground that it was interlocutory and not final. It was held that all the boundaries of the tract should have been ascertained and established by a survey, and a decree of confirmation entered for the tract surveyed.

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In answer to the objection that the district court had no means of ascertaining the boundaries by a survey, or compelling the surveyor to execute its decree, that court declared that the district court *had* power to enforce the fulfilment by the surveyor of its decree, and added that "the power of the district court over the cause does not terminate until the issue of a patent conformably to its decree." (21 How. 451.)

The decision was received here with surprise, but with great satisfaction. The authority thus attributed to this court was immediately invoked, and application was made in many cases for orders to the surveyor-general to return into this court, for reform and correction, surveys alleged to be erroneous.

Before exercising this jurisdiction the court heard an argument, in which most of the members of the bar concerned in land cases participated, as to the true construction and effect of the decision of the supreme court and the practice to be adopted under it. The views of the bar were various and conflicting. It was held, however, by the court that the decision in question in effect overruled the previous decisions of the supreme court, which had declared the jurisdiction of the court to be "*limited* to making decisions upon the validity of land claims preliminary to their location and survey by the surveyor-general," and that henceforth the court must assume the duty of correcting and reforming all surveys made under its decrees, when alleged to be erroneous.

This construction of its decision was recognized by the supreme court as correct in subsequent cases.

"In the case of *The United States v. Foshat* (21 How. 445), this court had occasion to refer to the limits of the authority of the courts of the United States under the act of March 3, 1851, above cited. We stated in that case that if questions of a judicial nature arose in the settlement of the location and boundary of grants confirmed to individuals, the district court was empowered to settle those questions upon a proper case being submitted to it before the issue of a patent, and in such case the judgment may

properly be extended to the confirmation of the survey and an order for the patent to issue." (*Castro v. Hendricks*, 23 How. 442.)

In the case of *The United States v. Heirs of Berreyesa* (23 How. 500) the supreme court says:

"The appellees have requested the court to give instructions relative to the location and survey of this grant, similar to those found in the case of the *United States v. Fossat*. (20 How.) But no question was decided in the court below upon the location of the lines of the tract, and it would be irregular for this court to assume that the action of that court will not conform to the established rules on the subject. The decree of the district court has not been called in question by the appellees; and should any difficulty arise in the location of the grant, it will be competent for the appellees to invoke the aid of that court."

This court having announced that it would exercise the new jurisdiction attributed to it, numerous surveys were ordered before it for revision and correction. The means thus offered of obtaining a judicial determination of the many difficult and important questions relative to the location of grants which had arisen, were eagerly seized on by both the representatives of the United States and of the claimants, for it substituted an inquiry in court, where witnesses could be summoned, examined and cross-examined, where counsel could be heard and a decision rendered, the grounds of which were exposed in an opinion, and from which an appeal could be taken to the supreme court, for the *quasi* trial before the surveyor-general, and for the still more unsatisfactory examination by an officer in Washington on *ex parte* affidavits, the contents of which, and even the fact that they had been forwarded, might be unknown to the party against whom they were taken.

But in the discharge of the duty thus imposed upon the court, great embarrassment was experienced. The supreme court had declared that the contest was limited to the United States and the claimants, and that third parties had no right to intervene. But it was obvious that the parties immediately affected by an erroneous location would

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often be *colindantes* or adjoining owners, between whom and the claimant a common boundary line was to be run; or purchasers from the original grantee of lands within the exterior boundaries, which might have been erroneously excluded from the survey, or grantees of the sobrante or excess within the exterior boundaries, who had a clear right to be heard as to the location of the first grant.

The United States, also, had an evident interest in requiring the dividing lines between the ranchos to be determined before the establishment of the lines to be run for quantity. For how could the latter be fixed while the former remained uncertain?

Although the court had power to hear and determine objections to surveys, no time was limited within which objections were to be made, except that it must be before the issue of a patent, nor were any means prescribed for giving notice to parties interested that a survey had been completed and approved by the surveyor-general. A survey, therefore, might be made, approved, transmitted to Washington, and a patent issued before, as was alleged to have happened in some cases, persons affected by it, and who would have objected to it, were apprised of the fact. Further legislation thus seemed to be indispensable. The law of 1860 was, therefore, recommended and passed, not to confer a new jurisdiction on the district courts, but, as its title imports, to define and regulate the jurisdiction the supreme court had already decided them to possess.

It provided in substance for a notice, by publication, of the approval of surveys by the surveyor-general. It limited the time within which objections were to be taken. It permitted all parties interested to intervene and be heard, and it assigned a limited period (six months) for taking an appeal from the decisions of the district courts. These or similar provisions I believe to have been indispensably necessary for the proper discharge by the district courts of the duties imposed upon them by the decision in *United States v. Foshat*.

I believe, also, that the law has been found, in practice, salutary and beneficial, and has been so regarded, almost

universally, by the parties affected by it or acquainted with its operation. And that the difficult and most important questions raised, with respect to the location of land claims, have been settled under it, more justly and satisfactorily to all parties than, making due allowance for the errors of a court not claiming to be infallible, was practicable under any other system.

It has recently been said, on very high authority, that the questions submitted by this law to the courts "involve the consideration of various matters not properly the subject of judicial inquiry," and that "it creates a new and anomalous jurisdiction in the court, which cannot be assumed independent of the act, and under it should be exercised only the cases coming clearly within its language."

I have already shown that the jurisdiction was declared by the supreme court substantially to exist, independently of and prior to the passage of the law of 1860, and that the act was passed to enable the district courts to carry out and give effect to the decision of the supreme court. That the jurisdiction conferred was not new or anomalous I shall now proceed to show:

By the provisions of the act of May 26, 1824, relative to land claims in territory acquired under the Louisiana purchase, which provisions were, by the act of May 23, 1828, made applicable to land claims in Florida, the courts were charged with a double duty: 1. That of determining all questions arising in the cause, relative to the title of the claimant; and 2. All questions relative to the "*extent, locality, and boundaries of the claim.*"

In defining the duties of the court under these acts, Mr. Justice Catron says: "First, the paper title to such private property it is our duty to investigate and ascertain, and by our decision to establish; and, secondly, it is our duty to ascertain and *cause to be surveyed and marked by definite boundaries* the lands granted." (*United States v. Forbes*, 15 Pet. 182.)

In the case of *United States v. Lawton* (5 How. 28), the same Justice holds substantially the same language.

Under the act of May 26, 1824, the proceedings were

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conducted according to the rules of a court of equity. All parties interested, or claiming to be interested, were brought before the court; process was served as in other cases, and the court had power to decide finally all questions and matters arising in the cause. (*United States v. Moore*, 12 How. 223.)

Under the act of March 3, 1851, the jurisdiction of the courts is limited to the making of decisions on the validity of the title; process is not issued, nor are all parties in interest brought in, or permitted to intervene.

The survey and location of claims, which have been confirmed, are committed to the surveyor, who is even invested with a *quasi* judicial authority to decide upon conflicting or interfering claims.

But the decrees of the courts and surveys of the surveyor-general, under the act of 1851, unlike the decrees and locations under the act of 1824, are conclusive only upon the United States and the claimants, and do not bind third parties. (*United States v. Foscat*, 20 How. 425.)

When, therefore, the supreme court, overruling its previous decision, attributed to this court jurisdiction, and made it its duty to fix the boundaries of the claim confirmed by an actual survey made under its direction, and declared that without such a survey the decree was not final, and that the jurisdiction of this court over the cause continued until the issue of a patent (21 How. 450); and, when congress, by the law of 1860, regulated and provided for the exercise of this jurisdiction by authorizing the courts to review and correct the surveys of the surveyor-general, after admitting all persons interested to become parties to the proceeding, the law, instead of being anomalous and exceptional, merely supplied a defect in the act of 1851, and brought the legislation, with regard to California land claims, into harmony with the previous legislation of congress in similar cases.

The defect of the law of 1851, consisted in giving to the courts jurisdiction to decide only upon the validity of claims, while questions of boundary and location were left

to the decision of the surveyor-general. It thus attempted to separate, and subject to different modes of determination, inquiries in their nature almost inseparable.

The inquiry the courts were authorized to make, was only whether the claim was valid, as against the United States, and all inconvenience or injustice which might arise from the exclusion of third parties was supposed to be obviated by providing that the decrees and patents should not affect their rights.

The supreme court, in its first decision in the Fossat case, distinctly traced, as we have seen, the line of discrimination between the duties of the courts and those of the surveyor-general. But, even then, it was apparent, and when the case came up again it was expressly recognized, that the inquiry into "*validity*" necessarily involved "questions of extent, quantity, location, and boundary, essential to be determined before even the '*validity*' of the claim could be decided." The distribution of powers, contemplated by the statute, was thus found to be impracticable, and the line of discrimination between the duties of the surveyor-general and those of the courts became obscure and undefined. Had the grants in California been for tracts bounded by natural limits, it might have been sufficient to determine the validity of the claim and establish its boundaries where it adjoined public land, leaving the boundary lines between the claimant and his neighbors, to be settled by a litigation *inter partes*.

But when the grants are for quantity, and the lines between the claimant's and the public land have to be drawn so as to include a certain area, it is obvious that no final, or at least no just, settlement of any of the boundaries can be made until the lines between the claimant and his neighbors are fixed. When, therefore, in its second opinion in the Fossat case, the supreme court directed this court to cause the northern line, which was to be run for quantity, to be surveyed upon the ground, it is apparent that this direction could not have been complied with until the eastern line was located either finally or provisionally.

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But that line was in dispute, and certainly no final determination of it could be made in a suit between the United States and Fossat, to which Berreyesa was a stranger.

But if it were merely fixed provisionally, and its final location still remained subject to future determination, to what end run other lines upon the ground, which depended upon and should be varied according to the future location of the eastern line?

I have referred more especially to the case of Fossat, because its circumstances are well known; but similar difficulties were presented in every case where the court was asked to inquire into surveys which pretended to fix external lines required to be run for quantity, while the dividing lines between the claimant and his neighbors remain unsettled. The law of 1860 removed these difficulties, by enabling the neighbors to be heard and become parties. It supplied the omissions of the law of 1851, and gave to the courts the jurisdiction, which they should have possessed from the beginning, to inquire into and decide, as under the laws of 1824 and 1828, all questions of location and boundary, after first admitting as parties all persons interested. Why the questions thus submitted to the courts are less fit subjects for judicial inquiry than similar questions of disputed boundary, daily litigated in ejectment suits, I have been unable to perceive.

If all questions of location and boundary are to be left to the decision of executive officers, as well might we declare that the duty of the ordinary tribunals, in appropriate cases, is merely to pass upon the issues raised by pleas of *non est factum*, or *devisavit vel non*, but that all questions as to the construction and operation of the deed, or will, are to be decided by the marshal or the sheriff. The case of Fossat, alone, would seem sufficient to apprise us, that a question of boundary involving such immense interests, to elucidate which volumes of depositions have been taken, and in which the briefs of counsel occupy hundreds of printed pages, is not in its own nature proper to be passed upon by merely executive officers, without hearing the testimony of witnesses, the arguments of counsel, or using the

other means of arriving at truth available in courts of justice.

The law of 1860 has been repealed. This court is thus relieved of what has hitherto been the most difficult, and the least grateful part of its duties. But as I was personally instrumental in procuring its passage, and as its wisdom and policy have been in high quarters doubted or assailed, I have thought it not improper to avail myself of this occasion to explain the grounds upon which it was recommended and believed to be necessary and beneficial.

The dismissal of the appeal from the second decree of this court, in the case *Fossat*, occasioned some embarrassment to the court and the counsel for the claimant. The supreme court had, in effect, decided that the decree was not final, because no survey of the land had been made. (See last opinion of the supreme court in *United States v. Fossat*, p. 6.) The law of 1851 authorized the surveyor-general to survey those lands only the claims to which had been *finally confirmed*. It thus seemed that there could be no final decree without a survey, and no survey without a final decree. The law of 1860 relieved the counsel for the claimant from this dilemma. He accordingly moved for and obtained an order, directing the surveyor-general to survey the tract confirmed to *Fossat*, and on the approval by him of the plat and survey thereof, to give notice of such approval, as required by the act of congress approved June 14, 1860.

No opposition was made to the granting of this motion. The order appears to have been entered on the day the motion was made. The original is on file, signed by the judge, but drawn by, and in the handwriting of the counsel for the claimant. Under this order a survey was made, and having been returned into this court at the instance of the New Almaden Company, the heirs of Berreyesa intervened, objected to the survey, and for the first time became parties to the controversy. The New Almaden Company also intervened and objected to the survey, and the parties proceeded to take testimony for and against it.

The Berreyesas having obtained a final confirmation, their rancho had been surveyed; and this survey, which adopted

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the same boundary line between the ranchos as that assumed in the Fossat survey, was also ordered into court on the application of the Berreyesas, in whose behalf exceptions are filed.

In this proceeding, the New Almaden Company, claiming under Castellero, and the Quicksilver Mining Company, claiming under Fossat, intervened and became parties. All parties being thus before the court, in each of the two suits, it proceeded to hear evidence and argument, and to decide upon the disputed line between the ranchos. It was not pretended by the counsel who before this court represented Fossat, that the controversy had ever been decided by this court on its merits. It was not by any one suggested, or suspected by the court, that the supreme court had, on a motion to dismiss an appeal on the ground it was taken from a decree not final, but interlocutory, meant to affirm, or any way to pass upon the correctness of the decree appealed from.

This court, thereupon, after full argument and deliberation, determined, by a decision applicable to both cases, the common line of division between the ranchos. But even if the original decree, entered when Fossat and the United States alone were parties, *had* assumed to determine the boundary line between the ranchos, and if that decree had been affirmed, I should not have hesitated, when the surveys of both ranchos came up for approval, to determine their common line of division as might under the evidence then adduced have appeared to be just, and irrespective of any decree obtained by either disputant in the absence of his adversary. And this for the following reasons:

1. The first decree of this court had been reversed, and the cause remanded, with directions to declare the boundaries mentioned in the grant within which the league of Larios was to be taken. This the court had done, and expressed its decision in a decree. That decree the supreme court had declared to be interlocutory, and not final. For that reason alone the appeal had been dismissed, and this court had been directed to cause a survey to be made, which when approved and embodied in its decree, would impart to it

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finality. The survey in the Fossat case had thus been made under a decree, which, by the positive declaration of the supreme court, was not a final, but merely an interlocutory decree. As such it was open to revision, until the court, by approving and adopting a survey, had made what the supreme court had declared would alone constitute a final decree in the cause.

2. It could not be pretended that the location of the dividing line was in any respect determined by the decree in the Berreyesa case; for that decree merely described his land as "adjoining that of Justo Larios, with the boundaries mentioned in the grant and delineated on the *diseño*." Berreyesa, therefore, had in his own case a clear right to have his land surveyed as might appear to be just. *He* could not be bound by decrees entered in another suit between Fossat and the United States, in which he had not been heard, and to which he was not and could not have been a party. If, then, the survey of the Fossat rancho was to be controlled by decrees previously entered in that suit, from which the court was not at liberty to depart, while the survey in the Berreyesa case remained open to further inquiry, and subject to the decision of the court on the merits, the result must have been that two inconsistent surveys would have been approved, and overlapping patents issued.

To make inconsistent decrees, and approve conflicting surveys, I considered wholly inadmissible. It would only have produced future litigation unnecessary and vexatious; when all the parties were before the court, and were anxious for a determination by this court, and the supreme court on appeal, of the controversy which had so long been pending.

3. The decision of the supreme court, and the provisions of the act of 1860, had imposed upon this court the duty of establishing by a survey all the boundaries of the Fossat rancho. As the northern line was to be run for quantity, it could only be fixed after all the other lines were determined. The dividing line between the ranchos had, therefore, first to be ascertained before the court or a surveyor could know where the northern line should be drawn, so as to make up the precise quantity of one league and no more.

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If, then, Berreyesa, intervening for the first time in the cause, had practically no right to be heard, and if the location of the dividing line was to be considered as fixed by a decree made before he became a party to the suit, such a course could be consistent with the commonest rule of justice only on the hypothesis that the location did not and could not affect his rights, but that the final location of the line would remain open to contestation in the ordinary tribunals.

But if this were so, the attempt to determine the northern boundary was idle and vain; for if Fossat was to obtain exactly one league, and no more, the line run for quantity ought to be varied with every subsequent location of the disputed boundary. Justice and the interests of the United States demanded, therefore, that in this and similar cases the lines between the claimant and his neighbors should be established before those run for quantity should be fixed; and it is obvious that this could be done only in a proceeding where the adjoining proprietors could appear, take evidence, and be heard, and in which they could not be bound by a decree entered in the suit before they were admitted as parties.

I have already observed that if, in a proceeding under the act of 1860 to correct a survey, the *colindantes* intervening in the suit are to be bound by the previous decree, it can only be on the theory that they are not affected by the survey, decree, or patent under it, but retain their rights unimpaired and capable of assertion in the ordinary tribunals.

But this theory would in practice be found deceptive, and the right of recourse to the ordinary tribunals illusory.

The California land claims are for the most part founded on mere equities—the legal title remaining in the United States, to divest which a patent is necessary.

If, then, a grantee to whom a patent for a specified tract of land had been issued, were to attempt before the ordinary tribunals to assert a right under his original grant to land not covered by his patent; and if, in addition, the land thus claimed were included within the patent of a neighbor,

to whom it had been surveyed and patented under another, and perhaps older, grant; it may well be doubted whether the bare statement of the case would not insure its dismissal by the ordinary tribunal. The "legal investigation and decision, by the proper judicial tribunal, of disputes between parties having interfering claims," which the act of 1851 contemplates, would, therefore, be found, after patents have been issued to both, a wholly unavailable remedy for the party injured by the erroneous determination of the dispute by the surveyor-general, or an *ex parte* decision of it by the United States courts.

But if, to avoid this result, and to give to both parties an equal standing in the ordinary courts, conflicting decrees should be made and overlapping patents issued, it is evident not only that interminable litigation would ensue, but that one of the claimants would be wronged by the United States; for the unsuccessful party would lose a part of the land covered by his patent, and would fall short to the extent of the land in dispute of the quantity to which he was entitled by his grant.

On these grounds I was of opinion that where two or more surveys of coterminous ranchos are before the court, on proceedings under the act of 1860, where the controversy relates to their common boundary lines and all the claimants have intervened in and become parties to the suit with respect to each survey, it was the duty of the court to determine the dividing lines irrespective of any decree obtained by either as against the United States; and that to make conflicting decrees and issue overlapping patents, or to fix the lines according to decrees entered before the *colindantes* were heard in the cause, would, in the one case, involve the parties in vexatious litigation, and, in the other, practically deprive the *colindante* of his rights without a hearing.

The language of the act of 1860 appeared to this court not merely to justify, but to demand this construction of its provisions. By the third section, all persons having an interest in, or whose rights are affected by any survey or location, are permitted to intervene. By the fourth section, the parties so intervening are allowed to take testimony "as

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to any matters necessary to show the true and proper location of the claim;" and the court, on hearing the allegations and proofs, is empowered to *render judgment thereon*; and if, in its opinion, *the location and survey are erroneous*, it is authorized to *set aside and annul the same, or to correct and modify*. (12 Stat. at Large, 34.)

It will be perceived that the intervening parties are permitted to take testimony, not merely as to whether the survey conforms to a previous decree of the court, by which their rights may have been prejudged in their absence, but "*as to any matters necessary to show the true and proper location of the claim;*" and the court, after hearing the new allegations and proofs, is required to render judgment thereon, and to set aside the survey, not when it fails to conform to the previous decree, but whenever, after hearing the proofs, the location and survey are "*in its opinion erroneous*." If congress had intended to give to the courts the same powers as were conferred upon them by the acts of 1824 and 1828—viz., to decide finally, after bringing before them all parties in interest, all questions relating to the extent, boundaries, and locality of the claims—I know not what other language could have been used to express the intention.

But to construe the act as limiting the powers of the court on the intervention of parties previously strangers to the cause, to the inquiry whether the survey conformed to the decree already made, would defeat in great part the purpose of the law; for the determination of the court would settle nothing. It could not settle the dividing lines, for they would be fixed according to a decree made before the *colindantes* were heard; and even the exterior lines where the claim is bounded by public land, could not rationally be considered as established, so long as the dividing lines by which in a grant for quantity they must necessarily be governed, remained uncertain.

I have thought it right thus to explain fully the grounds on which the opinion of this court was based, in order that its action, which has been so much criticised, may be thor-

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oughly understood, and the nature of its errors (if errors it has committed) may be exactly appreciated. I have felt at liberty to do so, from the fact that in the recent opinion of the supreme court the question last considered is not discussed, but the construction given by the counsel for the claimant to the act of 1860 seems to have been adopted as necessarily and of course correct. I have explained the reasons for my opinions, not in any spirit of rebellion or protest against the authority which it is my duty and my desire to obey, but because I thought it just to present to the supreme court, it may be for the first time, the reasons which led me to arrive at a conclusion which it has pronounced to be incorrect, and to show that the action of this court, though perhaps erroneous, was not, as has been supposed, inconsistent, hasty, or inconsiderate.

With respect to the supposed change of the decrees of this court, I believe I have shown beyond controversy:

1. That no decision was ever made, or intended to be made, of the dispute regarding the eastern line until the last decree under the provisions of the act of 1860, and that this court had good grounds for believing that it had no authority to make any such decision.

2. That it was not aware, and had no reason to suspect, that any decree supposed to determine that line had been affirmed by the supreme court.

3. That even if the fact had been otherwise, there were strong reasons for believing that a decree so entered in a suit between the United States and the claimants, did not and ought not to bind other parties subsequently intervening for their interests under the provisions of the act of 1860.

I trust, therefore, that the injustice of the implied censure contained in the recent opinion of the supreme court will be recognized by that high tribunal.

It remains to determine how far the decision of the supreme court in the case of *United States v. Foshat* is decisive of the question raised in the case at bar. It will be observed, that though in the opinion of the supreme court it is distinctly declared that, in a proceeding under the act of

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1860, the duties of this court are limited to an inquiry whether the survey conforms to the decree previously entered in the cause, yet that the location of the dividing line is discussed on its merits, and the location adopted by this court adjudged to be erroneous. That at least a majority of the court assented to its judgment is certain. But it may very possibly be that the assent was given by some of its members on the ground that they agreed on the question raised as to the true location of the eastern line, without concurring in the general principle announced, viz., that *colindantes* and other intervenors in a proceeding under the act of 1860, who then for the first time are heard in it, are bound by the terms of a decree entered when the only parties to the suit were the United States and the claimant. The volume containing the last decisions of the supreme court has not been received in this state. Whether or not a majority of the court adopted *all* the views expressed in the published opinion, I am uninformed. I only know that they assented to the judgment.

But on the hypothesis that they did, the case at bar is distinguishable from that of Fossat. Here the claimant has intervened, and become a party to a proceeding which necessarily involved the determination of the common boundary line between the ranchos. From the decision in that proceeding he might have appealed, and in case the location of the Mesa rancho as established by this court had been altered, there would still have been assigned to the claimant of that rancho the full quantity of land to which he was entitled. As the case now stands, the owners of the Mesa rancho can only obtain the land as surveyed and located under the decision of this court; and if the claim of the owners of the Rodriguez rancho be allowed, their land will in part be located on the tract surveyed to Mesa, and overlapping patents must be issued creating certain litigation, and a possible loss by Mesa of a part of his land. The position of Rodriguez is thus closely analogous to what would be the position of Berreyesa if he should seek to have the line between him and Fossat adjudicated anew, according to the calls of his own decree.

It may well be doubted whether the supreme court would

re-open the whole controversy, and on finding that the Berreyesa decree called for a line different from that called for in the Fossat d cree, would make a new location of it, and direct overlapping patents to issue.

In the case at bar, the injustice of now depriving Mesa of a considerable portion of the land which, contrary to his own wishes, has been surveyed to him, is so manifest that I do not feel called upon, on the authority of a single case, where the effect and practical operation of the doctrines announced may not have been fully presented to the supreme court, to take from Mesa land surveyed, and perhaps patented, and for which there are now no means of giving him an equivalent by extending his lines in other directions.

I think, therefore, that the survey of the land confirmed to Rodriguez should be corrected by conforming the lines strictly to those called for in the decree, except that on the east it must follow the lines established by the final survey of the Mesa rancho, as the lines of division between the ranchos.

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ADMINISTRATOR.

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2. THE COUNTY COURTS, under the constitution of Oregon, have general jurisdiction of probate matters, to be limited and regulated by statute, in accordance with the constitution. *Id.*
3. SAME.—Under the statutes of Oregon, letters of administration upon the estates of persons dying without a will are to be granted by the county court of the county of which the intestate was an inhabitant at or immediately before his death upon the presentation of a petition to the court alleging the necessary facts, including the fact of such inhabitancy. *Id.*
4. JURISDICTION, WHAT IS.—Where the petition for letters of administration alleges all the facts necessary to give the court jurisdiction, the court is required to inquire into the truth of the facts so alleged, and is authorized to determine and adjudicate thereon; and such authority to inquire and adjudge is jurisdiction. *Id.*
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4. **SAME—POSSESSION.**—A stranded vessel, laden with a valuable cargo, was left, but not abandoned, by the master, having been placed in charge of an agent until he could return to recover his property: *Held*, that the wrecked vessel and her cargo could not be taken possession of by a stranger who was fully advised of these facts; and that the master was then on his way in another vessel to effect the salvage. *Id.*
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7. **FOREIGN PORT.**—A vessel is in a foreign port, in the sense of the maritime law, when she is in a port without the state where she belongs and her owner resides. *Id.*

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8. **SHIP—MORTGAGE OF.**—A mortgagor of a ship in possession with the consent of the mortgagee, is thereby authorized to make any change, addition, or repair thereon necessary and convenient for her preservation and use as a ship, so that he does not wilfully depreciate her value as a security to the mortgagee; and in such case, the old material displaced by the new may be disposed of by the mortgagor as his property, unaffected by the mortgage. *Id.*
9. **IDEM.**—But in case said material is not thus disposed of, and is left on board, and passes into the possession of the mortgagee with the vessel, and is capable of being used in some form in its ordinary navigation, it would still be within the operation of the mortgage, and belong to the mortgagee. *Id.*
10. **IDEM.**—But if the old material, as such, is not suited for use in the navigation of the vessel, the fact that the mortgagor allows it to remain on board does not show that he did not intend to withdraw it from the operation of the mortgage and appropriate it, in exchange for the new material put in its place. *Id.*
11. **OLD COPPER.**—While the *Canada* was in possession of George and Jabez Howes, as mortgagors, and making the voyage from New York to Portland, Oregon, she was recoppered at Rio de Janeiro, and a portion of the old copper stowed in her hold and brought to Portland, where she was taken possession of by Sutton & Co., as mortgagees: *Held*, that the old copper was separated from the ship and withdrawn from the operation of the mortgage, and was the property of the mortgagors. *Id.*
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13. **LIEN OF MATERIAL-MAN AND MORTGAGEE.**—When the local law gives a lien for supplies furnished to a vessel in her home port, and provides that such lien shall be preferred to that of a mortgagee, a court of admiralty will enforce it accordingly; and such lien will be so enforced by a court of admiralty when the local law is silent on the subject, upon the grounds: 1. That a lien of a maritime contract, whether it arises under the local law or the maritime law, is practically a maritime lien and entitled to rank accordingly, and to be preferred to that of a mortgage. 2. That a mortgagor in possession is the agent of the mortgagee in obtaining supplies for the vessel, and the lien given therefor binds the interest of the latter as well as that of the former. *Id.*
14. **REGISTRATION OF MORTGAGE.**—Section 4192 of the Revised Statutes, providing for the registration of mortgages of vessels, does not change the nature or operation of the lien of such mortgage, but only provides that without such registration it shall not be valid; and, therefore, a state law preferring the lien of a domestic material-man to that of a mortgage is not in conflict with such section. *Id.*
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ground, upon which a licensed pilot is entitled to so much per foot draft of the vessel piloted, for his services, without reference to the distance they may be required; and if such pilot first offers his services to a sea-going vessel upon such waters and is refused, he is entitled to recover half-pilotage; the *Glencarne*, a sea-going vessel of six hundred tons burden, and sixteen and a half feet draft, being at Astoria, in charge of a Washington Territory pilot, licensed for the Columbia river only, and bound on a voyage to Portland, was spoken by an Oregon pilot, who offered his services to conduct her to Portland, which offer was refused: *Held*, that the vessel might take either pilot while on the Columbia river, but as only the Oregon one was entitled to pilot her on the Willamet river, his offer was a valid tender, so far, of pilot service, upon the refusal of which the vessel became liable to him for half-pilotage. *The Glencarne*, 200.

16. HALF-PILOTAGE.—Where the pilot law provides that an offer of pilot service, if refused, shall entitle the pilot to half-pilotage, such offer and refusal, in law, create an obligation or contract to pay such half-pilotage, which may be enforced in the admiralty against the owner or vessel. *Id.*
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18. JOINDER OF CLAIM IN REM AND IN PERSONAM.—Under admiralty rule 15, in a suit for damage by collision, a claim in *rem* and in *personam* cannot be joined in one libel. *Clatsop Chief*, 274.
19. SEMBLE.—That but for said rule they might be so joined, and that convenience in prosecuting the claim would thereby be promoted. *Id.*
20. FELLOW-SERVANT—INJURY TO.—Exception to libel for injury to a fireman on a steam vessel caused by the negligence of the master, on the ground that they were fellow-servants of a common employer, and that such fireman was aware of the incompetence of the master, overruled, upon the impression that the fireman and master were not fellow-servants in the sense which excuses the common employer from liability for an injury suffered by one in consequence of the misconduct or negligence of the other, with leave to raise the question upon the final hearing. *Id.*
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24. PROFITS FROM USE OF VESSEL.—Where a part owner of a vessel employs her on his own account and risk, the other part owners are not entitled to a share of the profits arising from such employment. *Id.*
25. COMPULSORY SALE OF VESSEL.—Where the equal part owners of a vessel cannot agree concerning her use and employment, a court of admiralty has jurisdiction, upon the application of either party, to compel a sale of the same and divide the proceeds between the owners; but where the disagreement arises between unequal owners the jurisdiction is, though without good reason, doubted and denied. *Id.*
26. THE CASE DECIDED.—An equal part owner of a vessel in the exclusive possession thereof required to give security for the return of his co-owner's interest, at the close of the business in which she was engaged, and in default thereof ordered that the vessel be sold; and that either party may apply for an order of sale upon the expiration of the stipulation for return. *Id.*
27. "INEVITABLE ACCIDENT." *Stewart v. Ship Austria*, 434.
28. SUFFICIENCY OF AN ANSWER.—*Semble*, that an allegation in an answer that the respondent is "ignorant" of a matter alleged in the libel is sufficient. *City of Salem*, 477.
29. LIEN OF MATERIAL-MEN.—The libel alleged that S. contracted with R., the owner of a steamboat, to repair her in her home port, and employed the libellants to work at said repairs as ship carpenters: *Held*, that upon the facts stated, and under the lien law of Oregon (Ses. L. 1876, p. 9), which gives a lien upon a boat for the value of labor done thereon at the request of a contractor with the owner, the libellants had a lien for their wages which might be enforced in the admiralty in a suit *in rem*, irrespective of the state of the accounts between S. and R., or the failure of S. to fully perform his contract. *Id.*
30. LIEN—NATURE AND WAIVER OF.—The lien of the material-man under the Oregon act does not depend upon any expressed intention or conscious purpose on his part to claim it, but it is an incident which the law attaches to the performance of the labor or the delivery of the materials under the circumstances stated, and can only be waived or discharged by an agreement or understanding with him to that effect. *Id.*
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32. WAIVER OF LIEN.—The libellant, a carpenter, testified that when he went to work upon the vessel he trusted his employer, the contractor, to pay him; that is, he expected him to do so, as he had done before, and did not think of claiming a lien upon the vessel until after the contractor had failed: *Held*, that this did not amount to an agreement to waive the lien, nor was it even any evidence of such an agreement. *Id.*
33. JURISDICTION.—An appeal lies to the circuit court for the district of California from the judgment of the consular court when the amount of the judgment exceeds two thousand five hundred dollars. *The Ping-On*, 483.

34. SECURITY.—Where a sum of money was deposited in the registry of the consular court in lieu of an appeal bond: *Held*, sufficient. *Id.*
35. MISJOINDER OF RESPONDENTS IN CROSS-LIBEL: *Held*, too late to raise the objection for the first time in the appellate court. *Id.*
36. COLLISION.—Where two steamers were approaching on such courses as to enable each to make the green light of the other on her starboard bow, and one vessel ported her helm: *Held*, that she was in fault. If by reason of smoke the vessel which ported her helm could not discern either of the side lights of the approaching steamer, it was her duty to blow her whistle and to slow or stop until the course of the approaching vessel could be ascertained. *Id.*

AGENCY.

1. AGENT, WHEN LIABLE ON A CONTRACT.—A person who signs a contract as agent without disclosing the name of his principal is liable thereon as principal. *Ye Seng Co. v. Corbitt*, 368.
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1. APPEAL—AMOUNT IN CONTROVERSY.—Where the statute in express terms limits a recovery to five thousand dollars, that sum is the highest amount in controversy, and there is no appeal. *Holmes v. O. & C. R. R. Co.*, 390.
See ADMIRALTY; ATTACHMENT.

APPENDIX.

CASES OF HISTORICAL INTEREST AND VALUE ON MEXICAN GRANTS.

APPURTENANCE.

1. APPURTENANCE.—A water right, granted in gross, does not become technically appurtenant to land and a mill upon and for which it is subsequently used by the grantee thereof; but where such water power is taken and applied to run a mill belonging to the owner of the power, and afterwards, while the water power is so being used, the owner conveys the premises by metes and bounds without mentioning the water right, the right may pass therewith as parcel thereof, if such appears to have been the intention of the parties. *Bank B. N. A. v. Miller*, 163.
2. WATER POWER NOT APPURTENANT, WHEN PASSES WITH LAND.—In 1864 a water right was granted by the owner of the basin at Oregon city in gross, and in 1866 the same was taken and applied to the use of a paper mill and machine shop on block 2 in said town; and in 1867, the same being the property of the owners of the water power, they converted it into a flour mill and applied such water power to the use thereof continuously and exclusively until 1878, when the owner of the mill and power conveyed the mill, describing the property by metes and bounds only, and without any express mention of said water right, to secure a loan of twenty thousand dollars, payable in two years, with interest at the rate of one per centum per month; the said property, in-

cluding said water right, being then worth not to exceed twenty-five thousand dollars, of which sum the water right was worth one third: *Held*, that upon the facts and circumstances of the case, it satisfactorily appeared that it was the intention of the parties that the water right should pass with the land and mill, and being then used in connection therewith, it did so pass as parcel thereof. *Id.*

ATTACHMENT.

1. SURETIES IN AN UNDERTAKING FOR AN ATTACHMENT, LIABILITY OF.—The sureties in an undertaking for an attachment under the Oregon civil code (section 144), in case the plaintiff fails to obtain judgment in the action, are liable to the defendant for all the costs and disbursements that may be adjudged to him, whether the latter are made in the action or upon the attachment. *Bing Gee v. Ah Jim*, 117.
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ATTORNEY'S FEE.

1. ATTORNEY'S FEE—UNAUTHORIZED CONTRACT FOR, IN MORTGAGE OF CORPORATION.—A vote of the directors of a corporation, instructing their president and secretary to execute a mortgage to secure the payment of a specific debt, does not authorize the insertion of a contract in such mortgage, binding the corporation to pay the mortgagee an attorney fee in case legal proceedings were taken to enforce the same. *P. R. M. Co. v. D., S. & G. R. R. Co.*, 61.
2. ATTORNEYS' FEE.—An unconditional fee of ten thousand dollars secured by a mortgage on real property for the services of a firm of three attorneys in defending an action in the district court involving a claim of one hundred and forty-three thousand dollars for damages and forfeitures under sections 3490 and 5438 of the revised statutes and the character of the defendant, in which there were three jury trials concerning transactions scattered through a quarter of a century, and extending from the Atlantic to the Pacific, and one writ of error to the circuit court, and a final judgment against the defendant for thirty-eight thousand and forty-nine dollars, is not unreasonable, and furnishes no evidence that the mortgage was made for a sum larger than that agreed to be paid, for the purpose of hindering, delaying, or defrauding the creditors of the mortgagor or in trust that a portion of the amount would be refunded to him. *U. S. v. Griswold*, 296.

BANKRUPTCY.

1. STOCKHOLDERS OF MINING CORPORATION—LIABILITY—ASSESSMENTS.—The stockholders of mining corporations organized under the laws of California, as the bankrupt corporation in this case was organized, incur no liability *ex contractu*, either express or implied, to pay in, either for the prosecution of the enterprise or the payment of the debts of the company, the nominal par value of their shares. *In re S. M. Con. Min. Co.*, 30.

2. **PERSONAL LIABILITY FOR ASSESSMENTS.**—Unless stockholders of a corporation have subscribed for stock, or are the successors of subscribers, assessments levied on their stock can be enforced only by the sale of their shares. *Id.*
3. **SECTION 349 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE** does not create any personal liability for assessments, unless, from the terms of the stockholders' subscription, such liability was incurred. *Id.*
4. **THE REMEDY OF CREDITORS** against the stockholder personally is limited and defined by section 322 of the code. *Id.*
5. **BANKRUPTCY—SURVIVING PARTNER.**—Where a surviving partner files his petition in bankruptcy, both individually and as surviving partner of a firm, the district court has authority, under the bankrupt act, to adjudge him bankrupt in both characters. *Briswallter v. Long*, 74.

BONDS.

1. **BOND FOR VALUE—AMENDMENT TO LIBEL OF INFORMATION—LIABILITY OF BONDSMEN.**—Where property under seizure has been delivered on bond given for value, the bondsmen are liable for the penalty of the bond, in case the property is condemned by the final decree of the court in the cause, and it is immaterial that the decree was upon a libel amended by leave of the court subsequently to the execution of the bond. *U. S. v. Mosely*, 265.

BRIDGES.

1. **JURISDICTION.**—A suit arises out of a law of the United States when the controversy involved in it turns upon the proper construction or application of such law; and, therefore, a suit by the owner of a vessel authorized to engage in the coasting trade upon the Wallamet river, and by riparian owners thereon, to enjoin the erection of a bridge over said river at Portland, as being in violation of the act of congress under which said vessel was enrolled and licensed, and the act of congress (11 Stat. 383) declaring said river a free and common highway, arises under said laws, whether the plaintiffs are entitled to the relief sought or not. *Hatch v. W. I. B. Co.* 127.
2. **NAVIGABLE WATERS—CONTROL OF.**—The power of congress to regulate commerce (Con., art. I, sec. 8) includes, for the purposes of commerce, control of all the navigable waters of the United States which are accessible from a state, other than the one in which they lie; and for this purpose, they are the waters of the nation, and subject to the legislation of congress in every particular affecting their navigability or use as instruments or means of commerce. *Id.*
3. **BRIDGES—NAVIGABLE WATERS.**—The state has the sole power to bridge the waters within its limits, but this power is subject to the power of congress to prevent obstructions to navigation being placed in such waters within the state and accessible from without it; and therefore, in the absence of legislation by congress to the contrary, a state may dam or otherwise obstruct the navigable waters within its limits at pleasure. *Id.*
4. **CONGRESSIONAL ACTION—CONSTRUCTION OF.**—The acts of congress authorizing a vessel to engage in the coasting trade within a state are construed as not manifesting an intention upon the part of congress to interfere with the power of the state to obstruct the navigable waters within its

limits, but only to authorize their navigation by such vessel for the purposes of such trade, so long and far as they are navigable. *Id.*

5. *IDEM.*—The provision in section 2 of the act of February 14, 1859 (11 Stat. 383), admitting Oregon into the Union, which declares that "all the navigable waters of said state shall be common highways and forever free" to all the citizens of the United States, is paramount to a law of the state authorizing a bridge to be erected across the Wallamet river; and therefore if such bridge, as proposed to be constructed, will materially impede or obstruct the free navigation of said river, it is unlawful, and the parties constructing it may be enjoined at the suit of the riparian owners injured thereby. *Id.*

BURDEN OF PROOF.

See ADMIRALTY.

CHARTER-PARTY.

1. *AGENT, WHEN LIABLE ON A CONTRACT.*—A person who signs a contract as agent without disclosing the name of his principal is liable thereon as principal. *Ye Seng Co. v. Corbitt*, 368.
2. *AGENCY.*—A person authorized to act for the charterers of a vessel, as agent, to procure a cargo in a foreign port, is not thereby authorized to modify or cancel the charter-party of his principal. *Id.*
3. *IMPOSSIBILITY—WHEN NO EXCUSE FOR NON-PERFORMANCE OF A CONTRACT.*—The owners of a vessel chartered her to carry passengers from Hong Kong to Portland, and stipulated in the charter-party that she was "tight, stanch, and strong, and in every way provided for said voyage;" but upon her arrival at Hong Kong she was found by the surveyor of the port to be "not fit to carry passengers," and refused permission to do so by the local authorities: *Held*, that the owners were not thereby excused from their contract, which was absolute and without condition, to carry passengers out of Hong Kong; and that even in the absence of the stipulation in the charter-party as to the character and condition of the vessel, the law would imply from the undertaking of the owner that she was in all respects "fit" to carry passengers out of said port. *Id.*

CHINESE.

1. *CHINESE LABORERS SHIPPING ON AMERICAN VESSELS.*—The act of congress of May 6, 1882, "to execute certain treaty stipulations relating to Chinese," declares that after the expiration of ninety days from its passage, and for the period of ten years, "the coming of Chinese laborers to the United States" is suspended, and that during such suspension "it shall not be lawful for any laborer to come, or having so come after the expiration of said ninety days, to remain within the United States;" and "that the master of any vessel who shall knowingly bring within the United States on such vessel, and land or permit to be landed, any Chinese laborer from any foreign port or place, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than five hundred dollars for each and every such Chinese laborer so brought, and also be imprisoned for a term not exceeding one year:" *Held*, 1. That the prohibition upon the master

- of a vessel is against the bringing of any Chinese laborer embarking at a foreign port or place, and does not apply to the bringing of a laborer already on board of the vessel when it touches at a foreign port; 2. That an American vessel is deemed to be a part of the territory of the state, within which its home port is situated, and, as such, a part of the territory of the United States; and the crew of the vessel, whilst on board, are within the jurisdiction of the United States, and, if foreigners, do not lose any right of residence in the United States previously acquired under treaty with their country. *Chinese Cabin Waiter*, 536.
2. IMMIGRATION OF CHINESE LABORERS.—The prohibition upon the master of a vessel contained in the act of congress restraining the immigration of Chinese laborers, to bring within the United States from a foreign port any Chinese laborer, was intended to prevent the importation of such laborers who there embark on the vessel—and does not apply to the bringing of a Chinese laborer already on board of the vessel touching at the foreign port. The decision in the case of Ah Sing, the Chinese cabin waiter, on this point affirmed. *Chinese Laborers*, 542.
 3. CHINESE LABORER EMPLOYED ON AMERICAN SHIP.—A Chinese laborer who has acquired the right of residence in the United States under the treaty with his country, does not lose such right by shipping on board of an American vessel, in an American port, as one of its crew for a voyage to a foreign port and back, and making such voyage under his shipping articles, though he may land at different times at such foreign port by permission of the captain, his connection with the vessel as part of the crew not being severed. *Id.*
 4. SAME—LANDING IN FOREIGN PORT.—The *status* of the laborer, or his relation to the vessel as one of its crew, is not changed by the fact that he is permitted by the captain to land at the foreign port for a temporary period. He is bound by his contract of shipment to return with the vessel, and the captain is bound to bring him back. To force him ashore or to abandon him there is a criminal offence, punishable by fine and imprisonment. *Id.*
 5. CONSTRUCTION OF STATUTES.—All laws should be so construed, if possible, as to avoid an unjust or an absurd consequence. Illustrations given. *Id.*
 6. CHINESE TREATY, 1880—ACT OF CONGRESS, 1882—CHINESE LABORERS AND MERCHANTS.—The first article of the treaty with China of November 17, 1880, provides that, "Whenever, in the opinion of the government of the United States, the coming of *Chinese laborers* to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it," declaring at the same time that "the limitation or suspension shall be reasonable, and shall apply *only to Chinese who may go to the United States as laborers, other classes not being included in the limitations.*" The second article further declares that "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body or household servants, and Chinese laborers who are now in the United States, shall be allowed

to come and go of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." The act of congress of May 6, 1882, passed pursuant to the authority of this treaty, suspends the coming of *Chinese laborers* to the United States for ten years, and prohibits the masters of vessels from bringing them from any foreign port, but excepts those who were here previously to November 17, 1880, or who may come before the expiration of ninety days from the passage of the act, and who shall produce certain prescribed certificates of identification. The sixth section of the act provides, that in order to the faithful execution of the provisions forbidding the coming of Chinese laborers, any other Chinese person entitled to come to the United States shall be identified by a certificate of the Chinese government, stating among other things his former and present occupation, and *place of residence in China*: *Held*, 1. That the certificate of the government required for others than laborers coming to the United States from China was intended to facilitate proof of their not being within the prohibited class, and not as a means of restricting their coming; 2. That the certificate is not required from merchants and others not laborers domiciled out of China when the act of congress was passed, and coming from the foreign jurisdiction; and 3. Proof of the occupation of such persons may be made by parol. *Chinese Merchant*, 547.

7. STATUTORY CONSTRUCTION.—The language of the act of congress should be construed, if possible, in harmony with the objects of the treaty. It will not be inferred that congress intended to disregard its stipulations. *Id.*

CITIZENSHIP.

See JURISDICTION.

COAL LANDS.

See SCHOOL AND COAL LANDS.

COLLISION.

See ADMIRALTY.

COMMISSIONER.

1. POWERS OF UNITED STATES ATTORNEY.—The district attorney of the United States possesses no absolute power to dismiss a criminal charge pending the examination of the accused before a commissioner. He attends the examination only as counsel of the government, to see that the evidence against the accused is properly presented. *U. S. v. Schumann*, 439.
2. SAME.—Nor has the district attorney any absolute power over a criminal charge pending before a grand jury. His duty requires him to attend its sessions, to advise it as to the law upon points desired, and, when directed, to draw an indictment—but he cannot prevent the consideration of the charge by declaring that the government will not prosecute the case. *Id.*
3. SAME.—After indictment found and before trial commenced, the district attorney has the absolute power to enter a *nolle prosequi*; and after the

trial has commenced he can dismiss the prosecution with the consent of the defendant. *Id.*

4. THE POWERS AND DUTIES OF COMMISSIONERS in criminal cases stated. *Id.*

CONSULAR COURTS—APPEALS.

See ADMIRALTY.

CONSTITUTIONAL LAW.

1. MORTGAGE TAX.—Under section 4, article XIII of the constitution of California of 1879, although the mortgaged property is liable, it is the duty of the mortgagee, and not of the mortgagor, to pay the taxes levied on the money, the payment of which is secured by the mortgage. The tax is the debt of the mortgagee, and not of the mortgagor. *Blythe v. Luning*, 504.
2. TAX LIEN ON MORTGAGED PROPERTY.—As the tax is a lien upon the land for the purpose of securing its payment, the mortgagor is permitted to pay the tax as a means of relieving his property from incumbrance, and then deduct the amount so paid from the amount of the debts secured. *Id.*
3. SAME—PAYMENT OF MORTGAGOR.—A tax was levied under said provision of the constitution upon the money secured by mortgage, and the mortgagor tendered the full amount due, less the estimated amount of the tax, the amount not having yet become finally fixed, which the mortgagee refused to accept; and he refused to pay the tax or allow the mortgagor to deduct the amount, or to discharge the mortgage without a full payment irrespective of any tax, "without promise, assurance of, or liability to pay said taxes or any part thereof." The mortgagor then tendered to the mortgagee, under protest, the full amount due without any deduction on account of the tax, which tender was refused. The mortgagor, thereupon, under protest, deposited the full amount due, including the tax, with a banker, for the use of the mortgagee, and notified the said mortgagee that the said money was subject to his order, whereupon the mortgagee accepted and received his money, and executed and delivered a satisfaction of the mortgage. The mortgagor was afterwards compelled to pay, and did pay, the tax, in order to enable him to discharge the lien and raise money on another mortgage, and having so paid the same, sued the mortgagee for the amount paid for said taxes: *Held*, that the mortgagor did not voluntarily pay the debt of another, but paid said tax *in invitum* to release his land from the lien, and that he was entitled to recover of said mortgagee the amount of taxes so paid. *Id.*

CONSULS.

1. CONSULS NOT AMENABLE TO SUBPENA.—The provision of the constitution, which secures to the accused in criminal prosecutions the right to have compulsory process for obtaining witnesses in his favor, does not authorize the issuing of such process to ambassadors, who by public law, or consuls, who by express treaty, are not amenable to the process of the courts. *In re Dillon*, 561.
2. SUBPENA DUCES TECUM—OFFICIAL DOCUMENTS.—Where a subpoena *duces tecum*, directed to a consul of France, is prayed for, it is the duty of the

court to require the party praying for it to show that the document is not an official paper, protected by law from examination and seizure. *Id.*

CONTRACT.

1. **CONTRACT, WHERE MADE.**—A policy was issued from the office of the plaintiff, in Milwaukee, Wisconsin, upon the life of M. E., in Portland, Oregon, and forwarded to the local agent there for delivery, containing a clause to the effect that the policy was not binding upon the company until countersigned and delivered there and the premium paid accordingly: *Held*, that the contract was completed in Oregon, that its validity must be determined by the laws of Oregon, and that the plaintiff being then prohibited from doing business in Oregon, the contract was null and void. *Northwestern M. L. Ins. Co. v. Elliott*, 17.
2. **ATTORNEY'S FEE—UNAUTHORIZED CONTRACT FOR, IN MORTGAGE OF CORPORATION.**—A vote of the directors of a corporation, instructing their president and secretary to execute a mortgage to secure the payment of a specific debt, does not authorize the insertion of a contract in such mortgage, binding the corporation to pay the mortgagee an attorney fee in case legal proceedings were taken to enforce the same. *P. R. M. Co. v. D., S. & G. R. R. Co.*, 61.
3. **RATIFICATION OF UNAUTHORIZED ACT.**—A majority of the directors of a corporation, at a meeting at which all the directors were not present, and of which they had no notice, directed the president and secretary to execute a mortgage as above stated, and they inserted therein a contract to pay an attorney as above stated; subsequently the directors, at a meeting duly called, ratified such mortgage, without any knowledge of its contents, except as indicated by the order for its execution in the records of the corporation: *Held*, 1. That the contract to pay an attorney's fee, not being authorized by the original order, and not being a necessary part of the mortgage, was not included in this ratification, unless it affirmatively appeared that the directors, all and collectively, were then aware that it was in the mortgage; and, 2. That the directors might be presumed to know what was in the records of the corporation, but not what was in a mortgage, executed by the president and secretary, without the authority or knowledge of the corporation, or the record of it in the county records. *Id.*
4. **CHANGE IN DUTIES.**—In a contract for the purchase of goods to arrive from Calcutta, it was provided: "Any change in duties to be for or against purchasers." After the making of the contract, and before the payment of the duties, the Secretary of the Treasury, in pursuance of section 3564 of the revised statutes, proclaimed a reduction in the value of the rupee, being the currency in which the invoices were made out (R. S. 2828), in consequence of which change in the value of the rupee, the amount of the duties required to be paid was diminished: *Held*, that the "change in duties" provided for in the contract, is a change in the rate of duties prescribed by law, and not a change in the aggregate amount of duties incidentally resulting from a change in the value of the rupee. *Detrick v. Balfour*, 348.
5. **STATUTES CONSTRUED.**—Sections 2838, 2906, 3473, and 3564 of the revised statutes of the United States construed. *Id.*

6. IMPOSSIBILITY—WHEN NO EXCUSE FOR NON-PERFORMANCE OF A CONTRACT.

The owners of a vessel chartered her to carry passengers from Hongkong to Portland, and stipulated in the charter-party that she was "tight, staunch, and strong, and in every way provided for said voyage;" but upon her arrival at Hongkong she was found by the surveyor of the port to be "not fit to carry passengers," and refused permission to do so by the local authorities: *Held*, that the owners were not thereby excused from their contract, which was absolute and without condition, to carry passengers out of Hongkong; and that even in the absence of the stipulation in the charter-party as to the character and condition of the vessel, the law would imply from the undertaking of the owner that she was in all respects "fit" to carry passengers out of said port. *Ye Seng Co. v. Corbitt*, 368.

7. DAMAGES.—The charterers procured two hundred passengers to ship on said vessel out of Hongkong at rates that would have netted them fourteen dollars apiece, or two thousand eight hundred dollars in the aggregate, which gains they were prevented from making by the failure of the owners to perform their contract: *Held*, that the prevention of these gains was a damage to the charterers which naturally arose from the breach of the contract, and must also have been in the contemplation of the parties thereto, and therefore they are entitled to recover them in a suit for such breach. *Id.*

8. MONEY PAID INTO COURT.—Money paid into court by a defendant is an absolute admission that so much is due upon the claim of the plaintiff and is so far a payment thereof, and the better opinion seems to be that the defendant may receive said deposit pending the litigation; and, in any event, he may prosecute his action for the remainder of his claim, subject to the risk of paying costs if he recover no more than the tender. *Id.*

See INSURANCE.

CONVEYANCE.

1. CONVEYANCE—INSUFFICIENTLY STAMPED—EFFECT OF.—Section 152 of the internal revenue act of June 30, 1864 (13 Stat. 292), as amended by act of July 13, 1866 (14 Stat. 141), while it avoids the record of a deed not duly stamped, or upon which the stamp is not cancelled, does not affect the validity of the original. Section 156 of said act (13 Stat. 293), imposes a penalty upon the vendor for not cancelling a stamp put upon his conveyance, but does not affect the validity of the conveyance itself. Section 158 of said act (13 Stat. 293), as amended by the act of July 13, 1866 (14 Stat. 142), imposes a penalty upon the maker for not duly stamping his conveyance, or omitting to cancel a stamp thereon, and declares the same void if either omission was made "with intent" to defraud the government; but whoever seeks to set aside or avoid a conveyance on that ground must allege and prove such fraudulent intent. *Dowell v. Applegate*, 232.

2. OMISSION TO STAMP CONVEYANCE.—An allegation that a conveyance was made and stamped for less than the actual consideration, with intent to aid or give color to a former fraudulent conveyance of the same premises to the grantor, or that such conveyance was made and stamped for

an "inadequate" consideration, does not show that such conveyance was not duly stamped with intent to evade the stamp act. *Id.*

3. CONVEYANCE TO DEFRAUD CREDITORS.—A purchaser from the grantee, in a conveyance to defraud creditors, without notice of the fraud, is, nevertheless, liable to any of such creditors for any portion of the purchase money remaining unpaid after notice of the fraud, and a court of equity will give such creditor a lien upon the premises for the amount. *Id.*
4. DEED, WHEN VOID UNDER THE INTERNAL REVENUE ACT.—A deed alleged to have been made with the intent to evade the internal revenue act or to defraud the United States, is not therefore invalid under section 158 (13 Stat. 294; 14 Id. 152) thereof, and to make it so, it must also appear that the deed was made without being duly stamped and with the intent thereby to evade the revenue act. *Id.*
5. GRANTEE IN DEED.—Said section 158 only avoids a deed on account of the intent of the grantor therein, and it is immaterial with what intent the grantee receives it or to what use he puts it. *Id.*

See FRAUD AND FRAUDULENT CONVEYANCES; WATER POWER.

CORPORATION.

1. FOREIGN CORPORATION.—The Oregon act (Or. Laws, p. 617) prohibiting a foreign corporation from "transacting business in this state," until it appoints a resident agent therein, was not intended to prevent such corporation from maintaining a suit in the state courts; and it is not in the power of the state to prevent it from maintaining a suit in this court. *Orange Nat. Bank v. Traver*, 210.
2. SAME.—A corporation formed under "the national banking act," is either a citizen of the United States only or a citizen of the state where it is organized and located: if the former, it is not a foreign corporation in this state; if the latter, it is a foreign corporation, but for that very reason may sue in the national courts herein, irrespective of the state legislation. *Id.*
3. SEPARATE PROPERTY OF MARRIED WOMEN.—A debt contracted by a married woman is in equity a charge upon her separate estate; but if contracted as surety for the benefit of another, the authorities are in conflict whether it creates such a charge, unless her intent to have it produce such effect is expressed in the contract; but in either case a note given by the wife for the debt of her husband with a stipulation that the note is taken by the payee "on the credit" of her separate estate, is sufficient evidence of her intention to charge her estate with the payment of such debt. *Id.*
4. STOCKHOLDERS OF MINING CORPORATION—LIABILITY—ASSESSMENTS.—The stockholders of mining corporations organized under the laws of California, as the bankrupt corporation in this case was organized, incur no liability *ex contractu*, either express or implied, to pay in, either for the prosecution of the enterprise or the payment of the debts of the company, the nominal par value of their shares. *In re S. M. C. M. Co.*, 30. •
5. PERSONAL LIABILITY FOR ASSESSMENTS.—Unless stockholders of a corporation have subscribed for stock, or are the successors of subscribers, assessments levied on their stock can be enforced only by the sale of their shares. *Id.*

6. SECTION 349 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE does not create any personal liability for assessments, unless, from the terms of the stockholders' subscription, such liability was incurred. *Id.*
7. THE REMEDY OF CREDITORS against the stockholder personally is limited and defined by section 322 of the code. *Id.*

See CONTRACT, 2, 3.

COURTS OF RECORD.

1. THE COUNTY COURTS OF OREGON are, under the constitution and laws of Oregon, courts of record; and their records are entitled to the same faith and credit as is attributed to the records of other superior courts. *Holmes v. O. & C. R. R. Co.*, 380.
2. THE COUNTY COURTS, under the constitution of Oregon, have general jurisdiction of probate matters, to be limited and regulated by statute, in accordance with the constitution. *Id.*

CRIMINAL LAW.

1. INDICTMENT—KNOWINGLY.—An indictment for voting without having a lawful right to vote, contrary to section 5511 of the Revised Statutes, should contain an allegation that the defendant "knowingly" so voted—even if the possession of such knowledge by him is a mere question of law. *U. S. v. Watkins*, 85.
2. CONVICTION OF CRIME—FORFEITURE OF THE PRIVILEGE OF AN ELECTOR. The constitution of the state of Oregon (art. 2, sec. 3) declares that "the privilege of an elector shall be forfeited by a conviction of any crime which is punishable by imprisonment in the penitentiary;" the defendant was indicted for an assault with a dangerous weapon, contrary to section 536 of the Oregon Criminal Code, which crime was thereby made punishable by fine or imprisonment in the jail or penitentiary, in the discretion of the court, to which accusation he pleaded guilty, and was sentenced to pay a fine of two hundred dollars; afterwards, on June 7, 1880, the defendant voted for representative in congress at an election held in Madison precinct, Oregon: *Held*, 1. That the term "conviction," as used in the constitution of Oregon, *supra*, is used in its primary and ordinary sense, and signifies a proving or finding that the defendant is guilty, either by the verdict of a jury or his plea to that effect, and does not include the sentence which follows thereon; 2. That a crime "is punishable" by imprisonment in the penitentiary, when by any law it may be so punished, and the fact that it also may be, or is otherwise punished, does not change its grade or character in this respect; 3. That the defendant was convicted by his plea of guilty of a crime punishable by imprisonment in the penitentiary, and thereby forfeited his privilege as an elector under the constitution of Oregon; and, 4. That assuming the term conviction to include the sentence, still the defendant was convicted of a crime so punishable—the liability to such punishment, and not the punishment actually inflicted, being the circumstance which controls the effect of the conviction in this respect. *Id.*
3. PARDON.—*Seem*, that such forfeited privilege may be restored by a pardon to that effect, granted in pursuance of a statute expressly authorizing it. *Id.*

4. LARCENY OF INDIAN PROPERTY.—The Indian intercourse act of June 30, 1834 (4 Stat. 729), was extended over Oregon, so far as the same was applicable thereto, by act of June 5, 1850 (9 Stat. 437): *Held*, that the provision of said act of 1834, providing for the punishment of a white man for stealing the property of an Indian, and *vice versa*, was applicable to Oregon, and thereafter in force there; and that the same was not modified or repealed by the admission of the state into the Union—February 14, 1859 (11 Stat. 383). *U. S. v. Bridleman*, 243.
5. UMATILLA RESERVATION, AN INDIAN COUNTRY.—The treaty of June 9, 1855 (12 Stat. 445), establishing the Umatilla reservation for the exclusive use of certain Indian tribes, was not modified or repealed by the act admitting Oregon into the Union, and from the date of such treaty, and by reason thereof, such reservation was and is "Indian country," and all laws for the punishment of crimes committed in such country are applicable thereto, and may be enforced in the United States courts for the district of Oregon. *Id.*
6. INTERCOURSE WITH THE INDIAN TRIBES.—The power of congress to regulate the intercourse between the inhabitants of the United States and the Indian tribes therein, is not limited by state lines or governments, but may be exercised and enforced wherever the subject—Indian tribes—exists. *Id.*
7. POWERS OF UNITED STATES ATTORNEY.—The district attorney of the United States possesses no absolute power to dismiss a criminal charge pending the examination of the accused before a commissioner. He attends the examination only as counsel of the government, to see that the evidence against the accused is properly presented. *United States v. Schuman*, 439.
8. SAME.—Nor has the district attorney any absolute power over a criminal charge pending before a grand jury. His duty requires him to attend its sessions, to advise it as to the law upon points desired, and, when directed, to draw an indictment—but he cannot prevent the consideration of the charge by declaring that the government will not prosecute the case. *Id.*
9. SAME.—After indictment found and before trial commenced, the district attorney has the absolute power to enter a *nolle prosequi*; and after the trial has commenced he can dismiss the prosecution with the consent of the defendant. *Id.*
10. THE POWERS AND DUTIES OF COMMISSIONERS in criminal cases stated. *Id.*

CUSTOMS.

1. CUSTOM AS TO MANIFEST—FORFEITURE.—Where a practice had long prevailed with the knowledge and acquiescence of the custom-house authorities, of allowing the officers and crews of steamers arriving from China to import and pay duties upon merchandise without entering it upon the manifest, and the collector, desiring to put an end to the practice, seized goods so imported, as forfeited under section 2809 of the revised statutes, and there was no evidence of a fraudulent concealment or of any design to evade the payment of duties: *Held*, that no decree of forfeiture could be passed, as it did not appear "that there was an actual intention to defraud the United States," as required by section 16 of the act of June 22, 1874. *U. S. v. Three Trunks*, 364.

2. **LIMITATION OF ACTION TO RECOVER DUTIES—NOTICE TO IMPORTER OF DECISION OF SECRETARY.**—Under section 2931 of the revised statutes the importer is not entitled to notice of the decision of the secretary upon an appeal from the collector, and the limitation of ninety days, within which the importer may commence an action under said section to recover duties alleged to have been illegally exacted, commences to run from the date of said decision, and not from the time the importer may have knowledge of it. *Chung Yune v. Shurtleff*, 448.

See DUTIES.

DAMAGES.

1. **DAMAGES.**—The charterers procured two hundred passengers to ship on said vessel out of Hongkong at rates that would have netted them fourteen dollars apiece, or two thousand eight hundred dollars in the aggregate, which gains they were prevented from making by the failure of the owners to perform their contract: *Held*, that the prevention of these gains was a damage to the charterers which naturally arose from the breach of the contract, and must also have been in the contemplation of the parties thereto, and therefore they are entitled to recover them in a suit for such breach. *Ye Seng Co. v. Corbitt*, 368.
2. **MONEY PAID INTO COURT.**—Money paid into court by a defendant is an absolute admission that so much is due upon the claim of the plaintiff, and is so far a payment thereof, and the better opinion seems to be that the defendant may receive said deposit pending the litigation; and, in any event, he may prosecute his action for the remainder of his claim, subject to the risk of paying costs if he recover no more than the tender. *Id.*

DEATH, ACTION FOR.

1. **STATUTE CONSTRUED—DEATH BY WRONGFUL ACT—KINDRED—PLEADING.** It is not indispensable that a complaint, drawn to recover damages for death by wrongful act, under the statute of Nevada, should set forth that there are kindred named in the act. There may be a recovery without it. *Roach v. Con. Imp. Min. Co.*, 224.
2. **SAME.**—But if proof is to be given of injury to kindred, the facts must be averred. *Id.*
3. **SAME.**—Under that statute, it is immaterial whether the death of the person injured is immediate or consequential. *Id.*

See ADMINISTRATOR.

DUTIES.

1. **CHANGE IN DUTIES.**—In a contract for the purchase of goods to arrive from Calcutta, it was provided: "Any change in duties to be for or against purchasers." After the making of the contract, and before the payment of the duties, the Secretary of the Treasury, in pursuance of section 3564 of the revised statutes, proclaimed a reduction in the value of the rupee, being the currency in which the invoices were made out (R. S. 2828), in consequence of which change in the value of the rupee, the amount of the duties required to be paid was diminished: *Held*, that the "change in duties" provided for in the contract, is a change in the

rate of duties prescribed by law, and not a change in the aggregate amount of duties incidentally resulting from a change in the value of the rupee. *Detrick v. Balfour*, 348.

2. STATUTES CONSTRUED.—Sections 2838, 2906, 3473, and 3564 of the revised statutes of the United States construed. *Id.*

See CUSTOMS.

EQUITY.

1. WHERE A DECREE IN EQUITY is obtained against a defendant for a sum of money, and execution has been returned unsatisfied, a court of equity has jurisdiction of a bill alleging that the defendant has secreted his property, and is disposing of the same with the avowed intent of defrauding the complainant, and depriving him of the fruits of his decree, and praying an injunction and receiver. It is not necessary in such a bill to particularly describe the assets, whether equitable or not, sought to be reached, and a court of equity will issue an injunction, appoint a receiver, and compel an assignment of all the property of the defendant, when such action is necessary to defeat the fraudulent designs of the defendant. *Shainwald v. Lewis*, 148.
2. QUERE.—Whether, upon such a showing to the court by petition in the original suit, a writ of sequestration may not issue? *Id.*
3. QUERE.—Whether, under such an original decree, and upon the showing above mentioned, the court has not the power to issue an injunction and make an order for a receiver and assignment, without requiring the complainant to file a so-called creditor's bill, or to wait for the return of an execution unsatisfied? *Id.*
4. AMENDMENT OF BILL.—After a demurrer to a bill is allowed, the right to amend rests in the discretion of the court, and leave to amend will not be granted unless it is necessary to promote or attain the ends of justice in the case. *Dowell v. Applegate*, 232.
5. CASE IN JUDGMENT.—A demurrer to a bill being sustained, the plaintiff asked leave to amend, to the effect that a deed to the demurrants was void under said section 158, for want of being duly stamped, which was denied—it also appearing, that said parties were *bona fide* purchasers for an adequate consideration. *Id.*
6. TAXES—INJUNCTION.—No injunction will be granted to stay the collection of taxes upon a bill which does not affirmatively show that so much of the tax has been paid or tendered without demanding a receipt in full, as is conceded ought to be paid, or so much as the court can see, or as can be shown by affidavits should be paid. *Huntington v. Palmer*, 355.
7. SAME.—A bill to restrain the collection of taxes which does not show a payment or unconditional tender of so much of the tax as is conceded, or can be shown to be properly due, does not present any equity sufficient to justify either preliminary or final relief. *Id.*
8. EQUITY RULE 90 neither enlarges nor limits the equitable jurisdiction of the courts of the United States, but merely regulates the practice in those cases wherein the court has jurisdiction under the constitution and laws of the United States in particulars not otherwise specially provided by rule. *Lewis v. Shainwald*, 403.
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- of chancery of the state of New York, prior to the passage of the revised statutes of New York, which provide for creditors' bills, had jurisdiction of a bill filed by a creditor after execution issued, and a return of *nulla bona*, to discover and apply to the satisfaction of the judgment or decree property subject to execution fraudulently conveyed or concealed for the purpose of evading the execution. *Id.*
10. SAME—GROUND OF JURISDICTION.—The jurisdiction arises under the head of fraud and trust. *Id.*
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 12. FISHING BILLS.—A bill which alleges with as reasonable certainty as the case admits the existence, and asks a discovery of, material facts, is not a "fishing bill." Fishing bills discussed. *Id.*
 13. NE EXEAT.—In a final decree, where the facts stated in the bill and established or admitted at the hearing justify it, a writ of *ne exeat republica* may be provided for, even though there be no prayer in the bill for the writ. The authorities indicate that the writ may also be issued, upon a proper application, after final judgment or decree. *Id.*
 14. SAME.—The writ of *ne exeat* is no more discharged by entry of judgment than an attachment. The very object of the writ is to detain the party within the jurisdiction of the court to secure the execution or the judgment or decree. *Id.*
 15. THE DISTRICT COURT has jurisdiction under section 716 of the revised statutes in a proper case to issue a writ of *ne exeat*. Section 717 relates to the several judges named as distinguished from the courts over which they preside. *Id.*
 16. EQUITY RULE 21.—The limitation of equity rule 21 only applies where the writ of *ne exeat* is asked for "pending the suit." *Id.*
 17. FINAL DECREE.—Whether a decree dissolving a partnership, directing a sale of the partnership property; that certain sums of money and costs, together with the partnership debts, be paid, and the remainder of the proceeds divided between the partners in prescribed proportions, without ascertaining the amounts of the debts, or other sums to be paid, and where other and further provisions are subsequently added to the decree, is a final decree from which an appeal may be taken, *quære?* *Wiegand v. Copeland*, 442.
 18. PARTNERSHIP ASSETS.—Real estate put into the partnership at an agreed valuation, as a part of the capital stock, and so entered upon the books of the firm, and used without objection as partnership property for more than three years, is partnership assets, although the partner originally owning it has made no actual conveyance to the firm, or of one half to the other partner, he having retained the legal title as security for the indebtedness of the other party for his share of the stock. In such case, although the legal title is still in the party originally owning it, he holds it in trust for the partnership, subject to his lien as between him and the other partner. *Id.*
 19. SALE OF REAL ESTATE OF PARTNERSHIP.—Where real estate constitutes a part of the partnership assets, and is in such a condition that it cannot be divided, or it is required to pay the partnership debts, the court has

- authority, upon a decree of dissolution, to decree a sale of such property, and out of the proceeds direct the partnership debts to be paid, any surplus that may remain to be properly divided between the partners. *Id.*
20. **SUBSEQUENT ERRORS.**—Where there is no error in the decree from which an appeal is specifically taken, or in the proceedings upon which it is based, errors in subsequent orders and proceedings under them, from which no appeal has been taken, cannot be considered. *Id.*
21. **COSTS IN EQUITY PROCEEDINGS** rest in the sound discretion of the court. *Id.*
22. **EQUITY SUIT TO RESTRAIN ACTION AT LAW—SERVICE OF PROCESS.**—Where an action for the possession of real property is brought in the circuit court of the United States by plaintiffs, who are non-residents of the state and absent from it, and the defence to the action arises out of matters purely of equitable cognizance, and a suit in equity for relief against the action is brought, the court will enjoin proceedings in the action at law until the suit in equity can be heard and determined, and direct service of the subpoena in the equity suit to be made on the attorneys of the plaintiffs in the action at law. *Cullin v. Ely*, 532.
23. **SERVICE OF SUBPENA ON ATTORNEYS.**—The retainer of attorneys at law by non-residents to bring an action to recover possession of land in this state, authorizes them to appear for their clients in a suit in equity, instituted by the defendants in that action, to establish their defence; and service of the subpoena in such suit on the attorneys may be allowed by the court and held to be good service. *Id.*
- See **MEXICAN GRANTS; MINES AND MINING LAWS; STATUTE OF LIMITATIONS.**

ESTOPPEL

1. **ESTOPPEL.**—In 1871 the premises in controversy were selected and approved by the land department as a part of the wagon-road grant without objection on the part of the state or any attempt to show that they were swamp, and in 1872 the state sold the same to the defendant as swamp, and the defendant is in possession without having paid the purchase money: *Held*, that the defendant has no title, and cannot prove title in the state under the swamp land grant, because the state is estopped to deny that the premises are within the wagon-road grant. *Cahn v. Barnes*, 48.

EVIDENCE.

See **PARTIES AS WITNESSES.**

EXECUTION AND EXECUTION SALES.

1. **TIME PURCHASE FROM STATE—SALE—EXECUTION.**—The interest which a person has under a time purchase from the state, while the contract remains in force, is property subject to levy and sale upon execution. *McWilliams v. Withington*, 205.
2. **SAME—RIGHT OF PURCHASER.**—The purchaser at such sale has a right to make the annual payments and perfect the title. *Id.*
3. **SAME—DUTY OF MORTGAGOR.**—In the absence of any false representations as to the extent of his interest or contract at the date of the mortgage under which the property is sold, it is not the duty of the mortgagor to perfect the title by making the annual payments. *Id.*

8. **SAME.**—In a suit brought to set aside a conveyance to the wife as fraudulent against the creditors of the husband, it is too late upon the hearing to raise the question that such conveyance or the record of it is void because the original is not duly stamped. *Id.*
9. **LIEN OF JUDGMENT AND CONVEYANCE.**—*Semble*, that section 268 of the Oregon civil code, which declares that a conveyance of real property shall be void as against the lien of a docketed judgment unless recorded within five days from its execution, should be limited to cases where such lien was acquired in good faith—without notice of such conveyance. *Id.*
See CONVEYANCE; FORFEITURE.

GUARDIAN AND GUARDIAN SALES.

1. **SALE OF LANDS BY GUARDIAN.**—A county court has jurisdiction to license the sale of lands by a guardian appointed by itself, upon the presentation by such guardian of a verified petition therefor stating the condition of the ward's estate and the circumstances tending to show the necessity or expediency of such sale; and the petition is sufficient to give jurisdiction when the order granting the license is attacked collaterally, if it appears therefrom or by reasonable inference from the facts stated therein, that the ward had no income, and that it was necessary to sell his land to maintain him in the insane asylum as provided by law. *Sprigg v. Stump*, 230.

INDIANS.

1. **LARCENY OF INDIAN PROPERTY.**—The Indian intercourse act of June 30, 1834 (4 Stat. 729), was extended over Oregon, so far as the same was applicable thereto, by act of June 5, 1850 (9 Stat. 437): *Held*, that the provision of said act of 1834, providing for the punishment of a white man for stealing the property of an Indian, and *vice versa*, was applicable to Oregon, and thereafter in force there; and that the same was not modified or repealed by the admission of the state into the Union—February 14, 1859 (11 Stat. 383). *U. S. v. Brilleman*, 243.
2. **UMATILLA RESERVATION, AN INDIAN COUNTRY.**—The treaty of June 9, 1855 (12 Stat. 445), establishing the Umatilla reservation for the exclusive use of certain Indian tribes, was not modified or repealed by the act admitting Oregon into the Union, and from the date of such treaty, and by reason thereof, such reservation was and is, "Indian country," and all laws for the punishment of crimes committed in such country are applicable thereto, and may be enforced in the United States courts for the district of Oregon. *Id.*
3. **INTERCOURSE WITH THE INDIAN TRIBES.**—The power of congress to regulate the intercourse between the inhabitants of the United States and the Indian tribes therein, is not limited by state lines or governments, but may be exercised and enforced wherever the subject—Indian tribes—exists. *Id.*
4. **ADVERTISING FOR SUPPLIES BY SUPERINTENDENT OF INDIAN AFFAIRS—PAYMENT FOR.**—The defendant, as superintendent of Indian affairs, published advertisements in two newspapers, inviting proposals for supplies, upon the authority of a general order to that effect, addressed to his predecessor in office by the commissioner of Indian affairs, in which it was stated that the order was made by the direction of the secretary

of the interior, and attached copies of said order to the bills for publishing such advertisements: *Held*, that the publication of such advertisements was authorized by the secretary of the interior within the meaning of section 3828 of the revised statutes; and that the payment therefor was a lawful expenditure of the public money intrusted to the superintendent, and ought to be allowed in his accounts. *U. S. v. Odeneal*, 451.

INDICTMENT.

See CRIMINAL LAW.

INJUNCTION.

1. CAUSE REMOVED—INJUNCTION.—Upon the removal of a cause from a state to a circuit court, the latter has power to modify or allow an injunction therein, before the first day of its next term. *Portland v. O. R. Co.*, 122.
2. INJUNCTION.—Where a suit for injunction turns wholly upon the validity of an act of the legislature granting the defendant the exclusive right to the use of certain property, to aid in the construction and operation of its railway, which is claimed by the plaintiff as a public levee or landing, and the use of such property in a way not materially in conflict with any use to which it is being put, is of great advantage to the defendant, an injunction restraining it from such use will be modified accordingly; and in the consideration of the matter, weight will be given to the presumption that an act of the legislature is valid and that the defendant is engaged in a public enterprise in which the public is interested. *Id.*
3. BOND.—Upon the modification of an injunction, the court may require, as a condition of such modification, that the defendant give a bond to secure the plaintiff against any injury which may result to it from the same, or to perform the final decree concerning the same. *Id.*
4. INJUNCTION GRANTED.—A preliminary injunction granted to restrain the building of a bridge over the Wallamet, with a draw of only one hundred feet on either side of the pivot-pier, under the authority of an act of the state legislature authorizing the building of such bridge, with a good and sufficient draw of not less than one hundred feet, upon evidence showing that such a bridge would materially obstruct the navigation of the river, because said act did not absolutely authorize a bridge with a draw of only one hundred feet, and if it did, it was in conflict with the act of congress of February 14, 1859, declaring the river a free and common highway, and therefore it is void. *Hatch v. Wallamet Iron B. Co.*, 128.
5. INJUNCTION.—A preliminary injunction granted to restrain the erection of a bridge across the Wallamet river, at Portland, contrary to the act of congress (11 Stat. 383) declaring the navigable waters of the state free and common highways, at the suit of a riparian owner injured thereby. *Id.* 141.
6. OBSTRUCTION TO NAVIGATION.—Where congress has declared a navigable river to be a common highway, the state cannot authorize an obstruction therein, and anything which materially interferes with or limits the navigability thereof, considering the use which it is or may be subject to, is an obstruction and a violation of such act of congress, which the United States circuit court has jurisdiction, under the judiciary act of 1875 (18 Stat. 470) to prevent or abate by injunction. *Id.*

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3. JURISDICTION, WHAT IS.—Where the petition for letters of administration alleges all the facts necessary to give the court jurisdiction, the court is required to inquire into the truth of the facts so alleged, and is authorized to determine and adjudicate thereon; and such authority to inquire and adjudge is *jurisdiction*. *Holmes v. O. & C. R. R. Co.*, 380.
4. SAME.—Under the statutes of Oregon, letters of administration upon the estates of persons dying without a will are to be granted by the county court of the county of which the intestate was an inhabitant at or immediately before his death upon the presentation of a petition to the court alleging the necessary facts, including the fact of such inhabitancy. *Id.*
5. SECOND ADMINISTRATOR.—The appointment of an administrator while there exists a legal administrator is void. *Id.*
6. EQUITY RULE 90 neither enlarges nor limits the equitable jurisdiction of the courts of the United States, but merely regulates the practice in those cases wherein the court has jurisdiction under the constitution and laws of the United States in particulars not otherwise specially provided by rule. *Lewis v. Shainwald*, 403.
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14. JURISDICTION—COLLUSIVE PARTIES.—Where parties conveyed land to a stranger, a citizen of another state, without his knowledge and without consideration, for the express purpose of creating a case of jurisdiction in the United States courts, and immediately, with the subsequent consent of the grantee, commenced a suit in the United States circuit court for the benefit of the grantors, expecting a reconveyance, although care was taken that there should be no promise made to reconvey: *Held*, that the transaction was only colorable and collusive for the improper purpose of

creating a case of jurisdiction for the courts of the United States within the provisions of the act of congress of 1875, and that the suit must be dismissed for want of jurisdiction. *Coffin v. Haggin*, 509.

15. JURISDICTION—ALIENS.—An alien between whose country and the United States there is a treaty stipulating that the citizens or subjects of his country shall have here all the rights, privileges, and immunities of the subjects of the most favored nation with which the United States have a treaty, has the right to pursue any lawful business here, and cannot be prevented from its pursuit by an invalid ordinance of the supervisors, and if arrested under it, may apply to the circuit court of the United States to be discharged. *Laundry Ordinance Case*, 526.

See ADMINISTRATOR; ADMIRALTY; EQUITY; RES ADJUDICATA.

LAUNDRIES.

1. INVALID LAUNDRY ORDINANCE.—An ordinance of the supervisors of the city and county of San Francisco declared that it should be unlawful for any person "to establish, maintain, or carry on any laundry within certain limits," which embraced more than half of the city and county, without first having obtained the consent of the board of supervisors, which should be granted only upon the recommendation of not less than twelve citizens and taxpayers in the block in which the laundry was proposed to be established, maintained, or carried on: *Held*, that the ordinance was invalid, in that it made the power vested in the supervisors depend for its exercise upon the consent of others. Their power cannot be thus delegated to others, or made dependent upon others' approval. *Laundry Ordinance Case*, 526.
2. LAUNDRIES NOT DANGEROUS.—The business of a laundry; that is, the washing of clothing and cloths of various kinds, and ironing or pressing them in a condition to be used, is not of itself against good morals, or contrary to public order and decency; it is not offensive to the senses or disturbing to the neighborhood where conducted, nor is it dangerous to the public safety or health. *Id.*
3. CONSENT OF NEIGHBORS.—The supervisors cannot make the prosecution of this business in particular blocks depend upon the consent of a prescribed number of citizens and taxpayers of the block. Such a restriction upon the pursuit of a lawful and inoffensive occupation is against common right, and void. The restriction might be equally applied to the pursuit of all other lawful and inoffensive occupations. *Id.*
4. BUSINESS MAY BE REGULATED.—If the business be conducted in a manner that is offensive or dangerous, the supervisors may direct the manner to be changed, and prescribe regulations for its prosecution. If the building in which it is carried on is, by its structure, form, or material, unsafe, the supervisors may, by proper proceedings, have it altered or removed. *Id.*
5. PROHIBITORY LICENSES.—Licenses cannot be required by the supervisors as a means of prohibiting any of the vocations of life, which are not injurious to public morals or offensive to the senses, or dangerous to the public health and safety; nor can conditions be annexed to their issue which would tend to such a prohibition. *Id.*

LIEN.

1. LIEN FOR SUPPLIES.—Where a steamboat was chartered under an agreement that the hirers should pay all expenses for supplies, etc., and

3. JURISDICTION, WHAT IS.—Where the petition for letters of administration alleges all the facts necessary to give the court jurisdiction, the court is required to inquire into the truth of the facts so alleged, and is authorized to determine and adjudicate thereon; and such authority to inquire and adjudge is *jurisdiction*. *Holmes v. O. & C. R. R. Co.*, 380.
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See ADMINISTRATOR; ADMIRALTY; EQUITY; RES ADJUDICATA.

LAUNDRIES.

1. INVALID LAUNDRY ORDINANCE.—An ordinance of the supervisors of the city and county of San Francisco declared that it should be unlawful for any person "to establish, maintain, or carry on any laundry within certain limits," which embraced more than half of the city and county, without first having obtained the consent of the board of supervisors, which should be granted only upon the recommendation of not less than twelve citizens and taxpayers in the block in which the laundry was proposed to be established, maintained, or carried on: *Held*, that the ordinance was invalid, in that it made the power vested in the supervisors depend for its exercise upon the consent of others. Their power cannot be thus delegated to others, or made dependent upon others' approval. *Laundry Ordinance Case*, 526.
2. LAUNDRIES NOT DANGEROUS.—The business of a laundry; that is, the washing of clothing and cloths of various kinds, and ironing or pressing them in a condition to be used, is not of itself against good morals, or contrary to public order and decency; it is not offensive to the senses or disturbing to the neighborhood where conducted, nor is it dangerous to the public safety or health. *Id.*
3. CONSENT OF NEIGHBORS.—The supervisors cannot make the prosecution of this business in particular blocks depend upon the consent of a prescribed number of citizens and taxpayers of the block. Such a restriction upon the pursuit of a lawful and inoffensive occupation is against common right, and void. The restriction might be equally applied to the pursuit of all other lawful and inoffensive occupations. *Id.*
4. BUSINESS MAY BE REGULATED.—If the business be conducted in a manner that is offensive or dangerous, the supervisors may direct the manner to be changed, and prescribe regulations for its prosecution. If the building in which it is carried on is, by its structure, form, or material, unsafe, the supervisors may, by proper proceedings, have it altered or removed. *Id.*
5. PROHIBITORY LICENSES.—Licenses cannot be required by the supervisors as a means of prohibiting any of the vocations of life, which are not injurious to public morals or offensive to the senses, or dangerous to the public health and safety; nor can conditions be annexed to their issue which would tend to such a prohibition. *Id.*

LIEN.

1. LIEN FOR SUPPLIES.—Where a steamboat was chartered under an agreement that the hirers should pay all expenses for supplies, etc., and

redeliver her at the expiration of the charter, free of all liens, and supplies were furnished, for which, by the laws of this state, a lien upon her was created: *Held*, that the vessel was liable unless her owner could show by a clear preponderance of proof that notice of the terms of the charter was given to the supply-men. *Steamboat Whipple*, 69.

2. **LIEN OF MATERIAL-MEN.**—The libel alleged that S. contracted with R., the owner of a steamboat, to repair her in her home port, and employed the libellants to work at said repairs as ship carpenters: *Held*, that upon the facts stated, and under the lien law of Oregon (Ses. L. 1876, p. 9), which gives a lien upon a boat for the value of labor done thereon at the request of a contractor with the owner, the libellants had a lien for their wages which might be enforced in the admiralty in a suit *in rem*, irrespective of the state of the accounts between S. and R., or the failure of S. to fully perform his contract. *City of Salem*, 477.
3. **LIEN—NATURE AND WAIVER OF.**—The lien of the material-man under the Oregon act does not depend upon any expressed intention or conscious purpose on his part to claim it, but it is an incident which the law attaches to the performance of the labor or the delivery of the materials under the circumstances stated, and can only be waived or discharged by an agreement or understanding with him to that effect. *Id.*
4. **LIEN OF MATERIAL-MAN.**—The lien upon a vessel given by the law of Oregon to a material-man is in addition to the personal responsibility of the contractor or employer, and takes effect upon the performance of his contract by operation of law, unless waived by an express agreement to that effect, or some affirmative act from which such agreement can be reasonably inferred. *Id.*
5. **WAIVER OF LIEN.**—The libellant, a carpenter, testified that when he went to work upon the vessel he trusted his employer, the contractor, to pay him; that is, he expected him to do so, as he had done before, and did not think of claiming a lien upon the vessel until after the contractor had failed: *Held*, that this did not amount to an agreement to waive the lien, nor was it even any evidence of such an agreement. *Id.*

See ADMIRALTY.

MARRIED WOMAN.

1. **SEPARATE PROPERTY OF MARRIED WOMAN.**—A debt contracted by a married woman is in equity a charge upon her separate estate; but if contracted as surety for the benefit of another, the authorities are in conflict whether it creates such a charge, unless her intent to have it produce such effect is expressed in the contract; but in either case a note given by the wife for the debt of her husband with a stipulation that the note is taken by the payee "on the credit" of her separate estate, is sufficient evidence of her intention to charge her estate with the payment of such debt. *Orange Nat. Bank v. Traver*, 210.

See FRAUD AND FRAUDULENT CONVEYANCES.

MATERIAL-MEN.

See LIEN.

MEASURE OF DAMAGES.

See DAMAGES.

MEXICAN GRANT.

1. **MEXICAN GRANT—MINING CLAIM.**—Where a party enters upon land claimed under a Mexican grant, after a confirmation under the act of congress of 1851, and pending the proceedings for location takes up a mining claim in pursuance of the provisions of the act of congress of 1866, and the patent subsequently issued upon the Mexican grant so confirmed, includes the mine so located, the patent is conclusive as between the parties. *Manning v. San Jacinto Tin Co.*, 418.
2. **SAME.**—A party so locating a mine cannot, upon a bill in equity, question the correctness of the location of the grant, on the ground that it was fraudulently located by the officers of the government, with the knowledge of the patentee, upon lands not covered by the grant, and for the fraudulent purpose of securing the mines. *Id.*
3. **SAME.**—The United States, if anybody, is the party injured by the fraud, and the only party that can vacate such patent for fraud in the location upon a bill filed for the purpose. *Id.*
4. **THE MERE LOCATOR OF A MINING CLAIM** upon land claimed under a confirmed Mexican grant, who has not applied for a patent, or tendered the purchase money, has no title from, or privity with, the government, and no status that enables him to attack a patent issued upon such confirmed Mexican grant upon the ground of fraud perpetrated by the officers of the government in the location. *Id.*
5. **SAME—EQUITY.**—The court could not do equity in such a case upon a bill filed by the locator and claimant of the mine. *Id.*
6. **STATUTE OF LIMITATIONS—FRAUD.**—Under the statute of limitations of California, an action for relief on the ground of fraud must be brought within three years after the cause of action accrues. *Id.*
7. **IGNORANCE OF THE FRAUD** will not excuse *laches* in the complainant, when the fundamental facts upon which the frauds charged rest are matters of public record, and such as ought to afford a clue, which, if followed with reasonable diligence, must have led to a discovery of the frauds. *Id.*
8. **MEXICAN GRANT PATENT.**—A patent issued upon the confirmation of a Mexican grant under the act of congress of 1851, to ascertain and settle land titles in California in an action at law, is conclusive evidence as against one having no patent, not only of the validity of the grant, but of the correct location of the claim confirmed, so as to embrace the lands as described in the patent. *Mora v. Nunez*, 455.
9. **PATENTS—DECREES OF CONFIRMATION, CONFLICT OF.**—A claim to certain small tracts of land, church buildings situate thereon, and appurtenances, was confirmed under the act of 1851, in due form surveyed and located under the act of 1860, and patented as so located to Joseph S. Alemany, Bishop of Monterey. Another grant of much larger dimensions was confirmed to Eulogio De Celis, the boundaries described in the decree of confirmation, including the said lands so patented to Bishop Alemany, without any exception of said lands in said decree. The certified survey and plat of said grant, subsequently approved by the order or decree of the district court, and the patent issued thereon, in express terms reserved and excepted the lands before patented to Bishop Alemany, thereby excluding them from the operation of the patent issued to De Celis: *Held*, that whether the said survey and patent rightfully or

wrongfully excluded said lands, the patent was conclusive as to the title in an action at law, and the patent including the lands must prevail over the patent excluding them and the decree of confirmation upon which it issued. *Id*; *U. S. v. Cambuston*, 575; *Note to same*, 593; *U. S. v. Folson's Ex'r*, 602; *Note to same*, 617; *U. S. v. De Rodriguez*, 617.

MINES AND MINING LAWS.

1. **LENGTH AND WIDTH OF LODGE CLAIMS.**—The act of congress of May 10, 1872, authorizes a claim to be located one thousand five hundred feet in length along the vein, and in the absence of any local rule or custom, the width of such claim may extend three hundred feet on each side of the middle of the vein; but said act of congress, by implication, authorizes the miners to limit the width of such claims to twenty-five feet on each side of the middle of the vein. *Jupiter Mining Co. v. Bodie Con. Mining Co.*, 96.
2. **MINERS' RULES MUST BE IN FORCE.**—To be of any validity, a rule or custom of miners must not only be established or enacted, but must be in force at the time and place of the location. It ceases to be operative whenever it falls into disuse, or is generally disregarded. *Id*.
3. **MUST NOT CONFLICT.**—The rules and customs of miners must not conflict with the laws of the United States, or the laws of the state in which the claims are located. *Id*.
4. **STILL IN FORCE.**—Section 748 of the code of civil procedure of California is still in force, except so far as it is limited by act of congress; and no distinction is made by this provision of the state statute between a custom or usage proved by parol evidence, and a rule adopted by a miners' meeting and recorded in writing. *Id*.
5. **QUESTION OF FACT.**—Whether or not a mining law or custom is in force at any given time, is a question of fact; but when shown to have been in force, the presumption is that it continues in force until the contrary is proved. *Id*.
6. **VOID FOR EXCESS OF WIDTH.**—Where a location, otherwise valid, exceeds the width allowed by law, it is void as to the excess, but valid as to the extent allowed by law. *Id*.
7. **DISCOVERY OF A VEIN.**—No rights can be acquired, under the statute, by location, before the discovery of a vein or lode within the limits of the claim located. *Id*.
8. **DEFINITION OF VEIN OR LODGE.**—A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It may be very thin, or many feet thick, or irregular in thickness; and it may be rich or poor, provided it contains any of the metals named in the statute. But it must be more than detached pieces of quartz, or mere bunches of quartz not in place. *Id*.
9. **DISCOVERY OF VEIN AFTER LOCATION.**—A location is made valid by the discovery of a vein or lode at any time after the location, provided, that such discovery is made before any rights are acquired in the same claim by other persons. *Id*.
10. **FIRST DISCOVERER.**—It is not necessary that the locator should be the

- first discoverer of the vein; but it must be known and claimed by him, in order to give validity to his location. *Id.*
11. OTHER VEINS THAN THOSE DISCOVERED.—Where a valid location is made upon a vein or lode discovered, the locator is not only entitled to the vein discovered, but to every other vein and lode throughout its entire depth, the top or apex of which lies within the surface lines of the claim extended vertically downwards, to which no right had attached in favor of other parties at the time the location became valid, although such veins or lodes may so far depart from a perpendicular as to extend outside of the vertical side lines. *Id.*
 12. HOW LOCATION TO BE MARKED.—A location of a mining claim must be distinctly marked on the ground so that its *boundaries* can be readily traced; but the law does not define, or prescribe, what kind of marks shall be made; or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed, by stakes, mounds, and written notices, whereby the *boundaries* can be readily traced, is sufficient. *Id.*
 13. RIGHT OF SUBSEQUENT LOCATOR TO OBJECT.—A subsequent locator has no right to object that the first location was not sufficiently marked on the ground at the time of the location, or before recording, provided that such first location was sufficiently marked on the ground before any valid subsequent location of the same claim. *Id.*
 14. OBLITERATION OF MARKS.—After a location has been lawfully made, the right of the locator cannot be divested by the mere obliteration of the marks or removal of the stakes without his fault, he having performed the other acts required by the statute. *Id.*
 15. AS TO RECORD.—The law of congress requires no record of a mining claim except in obedience to valid local rules or customs of miners; but when such local rules or customs require a record, it must contain the names of the locators, the date of the location, and such a description of the claim by reference to some natural object or permanent monument, as will identify the claim; but such natural objects or permanent monuments are not required to be on the ground located, although they may be; and the natural object may consist of any fixed natural object; and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground. If, by reference to any such natural object or permanent monument, the claim recorded can be identified with reasonable certainty, the record will be sufficient in this particular, otherwise not. *Id.*
 16. OBJECT AND EFFECT OF RECORD.—The object of recording mining claims is to give notice to others desiring to locate in the vicinity. The language of the act of congress authorizing miners to make regulations "governing the location and manner of recording," implies that the act of location is distinct from that of recording, except where the regulations of miners make recording necessary to constitute a location; so that, a location may be complete and vest the exclusive right of possession before any record thereof is made, unless recording is made an act of location, or one of the acts necessary to constitute a location, by miners' rules or regulations. *Id.*
 17. FORFEITURE BY FAILURE TO RECORD.—The right to a mining claim will

- not be forfeited by a failure to record the same, in the absence of a miners' rule or regulation providing for a forfeiture on that ground. *Id.*
18. **EFFECT OF ACTUAL NOTICE.**—In the absence of any miners' rule or regulation making recording a necessary act or condition of a complete location, or providing for a forfeiture by failure to record, a prior location of a mining claim, without recording the same, gives the locator thereof the exclusive right to possess and enjoy the same as against all persons having actual notice of such location and the extent thereof. *Id.*
19. **WORK NECESSARY TO HOLD A CLAIM.**—The statute requires one hundred dollars' worth of work on each claim located after May 10, 1872, in each year, and in default thereof, authorizes the claim to be relocated by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year, and before any relocation is made, he thereby preserves his claim; the statute nowhere authorizes a trespass upon, or a relocation of a claim before located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim. *Id.*
20. **WORK TO HOLD ADJOINING CLAIMS.**—Where one person or company owns several contiguous claims capable of being advantageously worked together, one general system may be adopted to work such claims; and work done according to such system for the purpose of prospecting or working all such contiguous claims, although done on only one of such claims, or even outside of all of them, is available to hold all such contiguous claims intended to be worked or prospected by such general system. *Id.*
21. **MINING LAW—THE AMENDMENT OF JANUARY 22, 1890, TO SECTION 2324 OF THE REVISED STATUTES,** does not act retrospectively, so as to save a claim from a forfeiture incurred before its passage. *Slavonian Mining Co. v. Vacavich*, 217.
22. **SAME—RELOCATION.**—There cannot be any relocation before the period within which work is required has expired, which can be made valid by a failure to work on the part of the original owners. *Id.*
23. **SAME—RESUMPTION OF WORK.**—There must be a *bona fide* attempt, at least, to resume. Threats a long distance from the claim, without any act towards carrying them out, are not a sufficient excuse for non-performance. *Id.*
24. **SAME.**—*Held*, also, that if the relocators had entered and were in actual possession after a forfeiture, although they had not relocated, the original locators would have no right to make a forcible entry for the purpose of resuming work. *Id.*
25. **MEXICAN GRANT—MINING CLAIM.**—Where a party enters upon land claimed under a Mexican grant, after a confirmation under the act of congress of 1851, and pending the proceedings for location takes up a mining claim in pursuance of the provisions of the act of congress of 1866, and the patent subsequently issued upon the Mexican grant so confirmed, includes the mine so located, the patent is conclusive as between the parties. *Manning v. San Jacinto Tin Co.*, 418.
26. **SAME.**—A party so locating a mine cannot, upon a bill in equity, question

the correctness of the location of the grant, on the ground that it was fraudulently located by the officers of the government, with the knowledge of the patentee, upon lands not covered by the grant, and for the fraudulent purpose of securing the mines. *Id.*

27. SAME.—The United States, if anybody, is the party injured by the fraud, and the only party that can vacate such patent for fraud in the location upon a bill filed for the purpose. *Id.*
28. THE MERE LOCATOR OF A MINING CLAIM upon land claimed under a confirmed Mexican grant, who has not applied for a patent, or tendered the purchase money, has no title from, or privity with, the government, and no *status* that enables him to attack a patent issued upon such confirmed Mexican grant upon the ground of fraud perpetrated by the officers of the government in the location. *Id.*
29. SAME—EQUITY.—The court could not do equity in such a case upon a bill filed by the locator and claimant of the mine. *Id.*

See SCHOOL LANDS AND COAL MINES.

MORTGAGE AND MORTGAGE TAX.

1. RATIFICATION OF UNAUTHORIZED ACT.—A majority of the directors of a corporation, at a meeting at which all the directors were not present, and of which they had no notice, directed the president and secretary to execute a mortgage as above stated, and they inserted therein a contract to pay an attorney as above stated; subsequently the directors, at a meeting duly called, ratified such mortgage, without any knowledge of its contents, except as indicated by the order for its execution in the records of the corporation: *Held*, 1. That the contract to pay an attorney's fee, not being authorized by the original order, and not being a necessary part of the mortgage, was not included in this ratification, unless it affirmatively appeared that the directors, all and collectively, were then aware that it was in the mortgage; and, 2. That the directors might be presumed to know what was in the records of the corporation, but not what was in a mortgage, executed by the president and secretary, without the authority or knowledge of the corporation, or the record of it in the county records. *P. R. M. Co. v. D., S. & G. R. R. Co.* 61.
2. MORTGAGE TAX.—Under section 4, article XIII of the constitution of California of 1879, although the mortgaged property is liable, it is the duty of the mortgagee, and not of the mortgagor, to pay the taxes levied on the money, the payment of which is secured by the mortgage. The tax is the debt of the mortgagee, and not of the mortgagor.—*Blythe v. Luning*, 504.
3. TAX LIEN ON MORTGAGED PROPERTY.—As the tax is a lien upon the land for the purpose of securing its payment, the mortgagor is permitted to pay the tax as a means of relieving his property from incumbrance, and then deduct the amount so paid from the amount of the debts secured. *Id.*
4. SAME—PAYMENT OF MORTGAGOR.—A tax was levied under said provision of the constitution upon the money secured by mortgage, and the mortgagor tendered the full amount due, less the estimated amount of the tax, the amount not having yet become finally fixed, which the mortgagee refused to accept; and he refused to pay the tax or allow the mort-

gagor to deduct the amount, or to discharge the mortgage without a full payment irrespective of any tax, "without promise, assurance of, or liability to pay said taxes, or any part thereof." The mortgagor then tendered to the mortgagee, under protest, the full amount due without any deduction on account of the tax, which tender was refused. The mortgagor, thereupon, under protest, deposited the full amount due, including the tax, with a banker, for the use of the mortgagee, and notified the said mortgagee that the said money was subject to his order, whereupon the mortgagee accepted and received his money, and executed and delivered a satisfaction of the mortgage. The mortgagor was afterwards compelled to pay, and did pay, the tax, in order to enable him to discharge the lien and raise money on another mortgage, and having so paid the same, sued the mortgagee for the amount paid for said taxes: *Held*, that the mortgagor did not voluntarily pay the debt of another, but paid said tax *in invitum* to release his land from the lien, and that he was entitled to recover of said mortgagee the amount of taxes so paid. *Id.*

NATIONAL BANK.

1. CORPORATION AS CITIZEN.—A corporation formed under "the national banking act," is either a citizen of the United States only or a citizen of the state where it is organized and located: if the former, it is not a foreign corporation in this state; if the latter, it is a foreign corporation, but for that very reason may sue in the national courts herein, irrespective of the state legislation. *Orange Nat. Bank v. Traver*, 217.

NAVIGABLE WATERS.

1. NAVIGABLE WATERS—CONTROL OF.—The power of congress to regulate commerce (Con., art. I, sec. 8) includes, for the purposes of commerce, control of all the navigable waters of the United States which are accessible from a state, other than the one in which they lie; and for this purpose, they are the waters of the nation, and subject to the legislation of congress in every particular affecting their navigability or use as instruments or means of commerce. *Hatch v. Wallamet Iron Bridge Co.*, 127.
2. BRIDGES—NAVIGABLE WATERS.—The state has the sole power to bridge the waters within its limits, but this power is subject to the power of congress to prevent obstructions to navigation being placed in such waters within the state and accessible from without it; and therefore, in the absence of legislation by congress to the contrary, a state may dam or otherwise obstruct the navigable waters within its limits at pleasure. *Id.*
3. CONGRESSIONAL ACTION—CONSTRUCTION OF.—The acts of congress authorizing a vessel to engage in the coasting trade within a state are construed as not manifesting an intention upon the part of congress to interfere with the power of the state to obstruct the navigable waters within its limits, but only to authorize their navigation by such vessel for the purposes of such trade, so long and far as they are navigable. *Id.*
4. IDEM.—The provision in section 2 of the act of February 14, 1859 (11 Stat. 383), admitting Oregon into the Union, which declares that "all the navigable waters of said state shall be common highways and forever free" to all the citizens of the United States, is paramount to a law of the state authorizing a bridge to be erected across the Wallamet river;

and therefore if such bridge, as proposed to be constructed, will materially impede or obstruct the free navigation of said river, it is unlawful, and the parties constructing it may be enjoined at the suit of the riparian owners injured thereby. *Id.*

5. **INJUNCTION GRANTED.**—A preliminary injunction granted to restrain the building of a bridge over the Wallamet, with a draw of only one hundred feet on either side of the pivot-pier, under the authority of an act of the state legislature authorizing the building of such bridge, with a good and sufficient draw of not less than one hundred feet, upon evidence showing that such a bridge would materially obstruct the navigation of the river, because said act did not absolutely authorize a bridge with a draw of only one hundred feet, and if it did, it was in conflict with the act of congress of February 14, 1859, *supra*, declaring the river a free and common highway, and therefore it is void. *Id.*

NE EXEAT.

1. **NE EXEAT.**—In a final decree, where the facts stated in the bill and established or admitted at the hearing justify it, a writ of *ne exeat republica* may be provided for, even though there be no prayer in the bill for the writ. The authorities indicate that the writ may also be issued, upon a proper application, after final judgment or decree. *Lewis v. Shainwald*, 403.
2. **SAME.**—The writ of *ne exeat* is no more discharged by entry of judgment than an attachment. The very object of the writ is to detain the party within the jurisdiction of the court to secure the execution or the judgment or decree. *Id.*

NEGLIGENCE.

See FELLOW-SERVANT.

OFFICIAL BOND.

1. **OFFICIAL BOND—PROOF OF EXECUTION OF.**—In an action upon an official bond, if the execution thereof is denied, it cannot be proved by a copy certified by the secretary of the treasury under section 882 of the revised statutes, but a copy certified by the register of the treasury under the seal of the department, under section 886 of the revised statutes, is sufficient proof of such execution, it being declared to have the same force as the original when duly authenticated or proved in court. *United States v. Humason*, 252.
2. **NONSUIT BY THE PLAINTIFF.**—Under section 243 of the Oregon code, the plaintiff in an action can only become nonsuit before the trial commences or afterwards with the consent of the defendant; and this is considered the later and better rule generally. *Id.*
3. **NEW TRIAL—STALE CLAIM.**—The United States delayed bringing an action against the sureties in the bond of a deceased Indian agent in Oregon, for an alleged failure to account for seven or eight thousand dollars received thereunder, for a period of fourteen years; and on the trial there was a verdict for the defendant by the direction of the court, because of the failure of the plaintiff to produce proof of the execution of the bond—which was denied—as provided in section 886 of the revised statutes: *Held*, that the plaintiff was guilty of negligence, and there-

fore was not entitled to a new trial; and that in passing upon the motion weight ought to be given to the fact of the long delay in bringing the suit, whereby it had become difficult, expensive, and almost impossible to make legal proof of facts which probably existed, tending to show that the deceased had duly disbursed the money in question. *Id.*

4. **STIPULATION TO ABIDE EVENT OF ANOTHER ACTION.**—A stipulation in one action to abide the event of another, entitles either party thereto, to such proceedings in the former as will enable him to have the benefit of his stipulation, provided the result of the latter action is favorable to him. *Id.*

ONUS PROBANDI.

See ADMIRALTY.

ORDINANCES.

1. **INVALID LAUNDRY ORDINANCE.**—An ordinance of the supervisors of the city and county of San Francisco declared that it should be unlawful for any person "to establish, maintain, or carry on any laundry within certain limits," which embraced more than half of the city and county, without having first obtained the consent of the board of supervisors, which should be granted only upon the recommendation of not less than twelve citizens and taxpayers in the block in which the laundry was proposed to be established, maintained, or carried on: *Held*, that the ordinance was invalid, in that it made the power vested in the supervisors depend for its exercise upon the consent of others. Their power cannot be thus delegated to others, or made dependent upon others' approval. *Laundry Ordinance Case*, 526.
2. **LAUNDRIES NOT DANGEROUS.**—The business of a laundry; that is, the washing of clothing and cloths of various kinds, and ironing or pressing them in a condition to be used, is not of itself against good morals, or contrary to public order and decency; it is not offensive to the senses or disturbing to the neighborhood where conducted, nor is it dangerous to the public safety or health. *Id.*
3. **CONSENT OF NEIGHBORS.**—The supervisors cannot make the prosecution of this business in particular blocks depend upon the consent of a prescribed number of citizens and taxpayers of the block. Such a restriction upon the pursuit of a lawful and inoffensive occupation is against common right, and void. The restriction might be equally applied to the pursuit of all other lawful and inoffensive occupations. *Id.*
4. **BUSINESS MAY BE REGULATED.**—If the business be conducted in a manner that is offensive or dangerous, the supervisors may direct the manner to be changed, and prescribe regulations for its prosecution. If the building in which it is carried on is, by its structure, form, or material, unsafe, the supervisors may, by proper proceedings, have it altered or removed. *Id.*
5. **PROHIBITORY LICENSES.**—Licenses cannot be required by the supervisors as a means of prohibiting any of the vocations of life, which are not injurious to public morals or offensive to the senses, or dangerous to the public health and safety; nor can conditions be annexed to their issue which would tend to such a prohibition. *Id.*

PARDON.

See CRIMINAL LAW.

PARTIES AS WITNESSES.

1. PARTY AS WITNESS WHEN OPPOSITE PARTY DEAD.—In the courts of the United States there can be no exclusion of a witness on the ground of interest in the event of the suit, except in the cases directly mentioned in section 858, Revised Statutes of the United States, i. e., where an executor, administrator, or guardian is a party such as that judgment may be rendered for or against him. *Rice v. Martin*, 337.

PARTNERSHIP.

1. BANKRUPTCY—SURVIVING PARTNER.—Where a surviving partner files his petition in bankruptcy, both individually and as surviving partner of a firm, the district court has authority, under the bankrupt act, to adjudge him bankrupt in both characters. *Briswall v. Long*, 74.
2. PARTNERSHIP.—Under the circumstances of this case, held that no partnership existed between the plaintiff and B. B. Norton. *Rice v. Martin*, 337.
3. FINAL DECREE.—Whether a decree dissolving a partnership, directing a sale of the partnership property; that certain sums of money and costs, together with the partnership debts, be paid, and the remainder of the proceeds divided between the partners in prescribed proportions, without ascertaining the amounts of the debts, or other sums to be paid, and where other and further provisions are subsequently added to the decree, is a final decree from which an appeal may be taken, *quere?* *Wiegand v. Copeland*, 442.
4. PARTNERSHIP ASSETS.—Real estate put into the partnership at an agreed valuation, as a part of the capital stock, and so entered upon the books of the firm and used without objection as partnership property for more than three years, is partnership assets, although the partner originally owning it has made no actual conveyance to the firm, or of one half to the other partner, he having retained the legal title as security for the indebtedness of the other party for his share of the stock. In such case, although the legal title is still in the party originally owning it, he holds it in trust for the partnership, subject to his lien as between him and the other partner. *Id.*
5. SALE OF REAL ESTATE OF PARTNERSHIP.—Where real estate constitutes a part of the partnership assets, and is in such a condition that it cannot be divided, or it is required to pay the partnership debts, the court has authority, upon a decree of dissolution, to decree a sale of such property, and out of the proceeds direct the partnership debts to be paid, any surplus that may remain to be properly divided between the partners. *Id.*
6. SUBSEQUENT ERRORS.—When there is no error in the decree from which an appeal is specifically taken, or in the proceedings upon which it is based, errors in subsequent orders and proceedings under them, from which no appeal has been taken, cannot be considered. *Id.*
7. COSTS IN EQUITY PROCEEDINGS rest in the sound discretion of the court. *Id.*

PATENT AND PATENT RIGHTS.

1. PATENT—CONTRADICTION OF, BY ORAL EVIDENCE.—On March 12, 1860 (12 Stat. 3), congress granted the swamp and overflowed lands in Oregon

to the state to be identified and patented by the secretary of the interior; on July 5, 1866 (14 Stat. 89), congress granted to the state, to aid in the construction of a wagon-road from Albany to the eastern line thereof, three sections per mile of the public lands to be selected within six miles of said road as the same might be located, and on June 18, 1874 (18 Stat. 80), authorized patents to issue therefor as fast as the same should be selected and certified; and on June 19, 1876, a patent was issued under said wagon-road grant to the state, or its assigns, for the premises in controversy: *Held*, that the patent was conclusive evidence at law that the premises were included in the wagon-road grant, and were therefore not swamp land—the latter conclusion being a necessary element of the former. *Cahn v. Barnes*, 48.

2. **ESTOPPEL.**—In 1871 the premises in controversy were selected and approved by the land department as a part of the wagon-road grant, without objection on the part of the state or any attempt to show that they were swamp, and in 1872 the state sold the same to the defendant as swamp, and the defendant is in possession without having paid the purchase money: *Held*, that the defendant has no title, and cannot prove title in the state under the swamp land grant, because the state is estopped to deny that the premises are within the wagon-road grant. *Id.*
3. **MODE OF MAKING PAVEMENT—INFRINGEMENT.**—The method adopted by the defendants in laying artificial stone pavements was as follows: They first laid down a section of cement and coarse gravel mixed, as wide as the blocks were wanted, and tamped it down solid. When partially set, these sections were cut into blocks of proper length with a trowel, the trowel cutting to a greater or less depth, according to the character of the material. Into the open joint thus made with the trowel, was floated or rubbed, some of the same material of which the block was composed. Then a top layer of finer material, containing a larger proportion of cement, was laid on the lower section, pressed down and smoothed over. The trowel was then passed along the top layer, cutting partially or wholly through it directly over the cutting below. The joint thus made in the upper layer was then smoothed over, and a joint-marker, having a tongue from a sixteenth to an eighth of an inch in depth, was run over the line of the cuttings marking off the joints: *Held*, 1. That artificial stone pavements constructed in the mode described, as used by the defendants, are infringements of the Schillinger patent; 2. That the patentee is entitled to all the benefits which result from his invention, whether he has specified them all in his patent or not; 3. That the respondents having so constructed their pavements as to gain the advantages secured by the Schillinger patent, and by substantially the same means, they are infringers of the patent. *Cal. Art. Stone Pav. Co. v. Molitor*, 190.
4. **INFRINGEMENT.**—A machine for drying fruit, which employs substantially the forms and mechanical contrivances of the one patented to William S. Plummer, is an infringement of such patent, although in some respects it is an improvement upon the latter. *Corvallis F. Co. v. Curran*, 270.
5. **EVIDENCE.**—A patent is *prima facie* evidence that the patentee was the inventor of the thing patented, and of its novelty and utility. *Id.*
6. **MEXICAN GRANT PATENT.**—A patent issued upon the confirmation of a

Mexican grant under the act of congress of 1851, to ascertain and settle land titles in California in an action at law, is conclusive evidence as against one having no patent, not only of the validity of the grant, but of the correct location of the claim confirmed, so as to embrace the lands as described in the patent. *Mora v. Nunez*, 455.

7. **PATENTS—DECREES OF CONFIRMATION, CONFLICT OF.**—A claim to certain small tracts of land, church buildings situate thereon, and appurtenances, was confirmed under the act of 1851, in due form surveyed and located under the act of 1860, and patented as so located to Joseph S. Alemany, Bishop of Monterey. Another grant of much larger dimensions was confirmed to Eulogio De Celis, the boundaries described in the decree of confirmation, including the said lands so patented to Bishop Alemany, without any exception of said lands in said decree. The certified survey and plat of said grant, subsequently approved by the order or decree of the district court, and the patent issued thereon, in express terms reserved and excepted the lands before patented to Bishop Alemany, thereby excluding them from the operation of the patent issued to De Celis: *Held*, that whether the said survey and patent rightfully or wrongfully excluded said lands, the patent was conclusive as to the title in an action at law, and the patent including the lands must prevail over the patent excluding them and the decree of confirmation upon which it issued. *Id.*
8. **PATENT VACATED.**—Where the state selects a tract of land in lieu of a like quantity of unavailable school lands, which tract so selected is not subject to selection, and the same is listed over to the state by the secretary of the interior, and by the state thereupon patented to private parties, a court of equity upon a bill filed by the United States will annul the selection, listing over, and patent, whether the unlawful acts arose out of fraud, inadvertence, or mistake, or errors of law committed by the officers upon known facts, as to the authority of the state to select, or the secretary of the interior to list over. *U. S. v. Mullan*, 466.
9. **BILL FILED BY ATTORNEY-GENERAL.**—Where a bill in chancery to annul a patent to land is filed in the name of the United States, having the signature of the attorney-general of the United States, subscribed by his authority, the court is authorized to entertain the bill. *Id.*
10. **VESTED RIGHTS.**—The state has no indefeasible vested right to select lands in lieu of sections 16 and 36 from any particular class of lands at any time before selection actually made. Until selection, congress may withdraw any lands from the operation of laws permitting their selection. *Id.*

See MEXICAN GRANTS; MINES AND MINING LAWS.

PAYMENTS, PRIORITY OF.

See UNITED STATES.

PILOTAGE.

1. **PILOTAGE ON THE COLUMBIA AND WALLAMET RIVERS.**—By the laws of Oregon, the waters of the Columbia and Wallamet rivers are a pilot ground, upon which a licensed pilot is entitled to so much per foot draft of the vessel piloted, for his services, without reference to the distance

they may be required; and if such pilot first offers his services to a sea-going vessel upon such waters and is refused, he is entitled to recover half-pilotage; the *Glennearne*, a sea-going vessel of six hundred tons burden, and sixteen and a half feet draft, being at Astoria, in charge of a Washington Territory pilot, licensed for the Columbia river only, and bound on a voyage to Portland, was spoken by an Oregon pilot, who offered his services to conduct her to Portland, which offer was refused: *Held*, that the vessel might take either pilot while on the Columbia river, but as only the Oregon one was entitled to pilot her on the Wallamet river, his offer was a valid tender, so far, of pilot service, upon the refusal of which the vessel became liable to him for half-pilotage. *The Glennearne*, 200.

2. HALF-PILOTAGE.—Where the pilot law provides that an offer of pilot service, if refused, shall entitle the pilot to half-pilotage, such offer and refusal, in law, create an obligation or contract to pay such half-pilotage, which may be enforced in the admiralty against the owner or vessel. *Id.*

PLEADING.

1. STATUTE CONSTRUED—DEATH BY WRONGFUL ACT—KINDRED—PLEADING. It is not indispensable that a complaint, drawn to recover damages for death by wrongful act, under the statute of Nevada, should set forth that there are kindred named in the act. There may be a recovery without it. *Roach v. Con. Imperial Min. Co.*, 224.
2. SAME.—But if proof is to be given of injury to kindred, the facts must be averred. *Id.*
3. SAME.—Under that statute, it is immaterial whether the death of the person injured is immediate or consequential. *Id.*
See EQUITY.

POWER OF ATTORNEY.

1. A POWER OF ATTORNEY, "to superintend any real and personal estate, to make contracts, to settle outstanding debts, and generally to do all things that concern my interest in any way real or personal whatsoever, giving my said attorney full power to use my name to release others or bind myself, as he may deem proper and expedient," does not empower the attorney to convey real estate. *Hunter v. Sac. Beet Sug. Co.*, 498.
- SAME—RATIFICATION.—An instrument under seal given to the attorney in fact, providing that, I "have this day made and concluded a final settlement with Henry A. Schoolcraft, my acknowledged agent and attorney in fact since the twenty-eighth day of July, 1849, for all the business matters and things in any wise appertaining to my interest, and upon such final settlement; I do hereby acknowledge myself to be firmly bound by all his acts as such agent or attorney in fact for me; hereby ratifying and confirming by these presents, whatsoever he may have done in my name or under my seal at any time heretofore, and, also, do I acknowledge the receipt in full of all sums of money, dues, obligations, and other things of said Henry A. Schoolcraft belonging to me, on account of said agency and attorneyship in fact, and that on the part of said Henry A. Schoolcraft there is nothing due or owing to me up to the date of these presents," does not ratify or validate conveyances of real estate made by

Schoolcraft assuming to act under the power of attorney mentioned in the first head-note. *Id.*

PRIORITY OF PAYMENTS.

See UNITED STATES.

PROCESS, SERVICE OF.

1. **EQUITY SUIT TO RESTRAIN ACTION AT LAW—SERVICE OF PROCESS.**—Where an action for the possession of real property is brought in the circuit court of the United States by plaintiffs, who are non-residents of the state and absent from it, and the defence to the action arises out of matters purely of equitable cognizance, and a suit in equity for relief against the action is brought, the court will enjoin proceedings in the action at law until the suit in equity can be heard and determined, and direct service of the subpoena in the equity suit to be made on the attorneys of the plaintiffs in the action at law. *Crellin v. Ely*, 532.
2. **SERVICE OF SUBPOENA ON ATTORNEYS.**—The retainer of attorneys at law by non-residents to bring an action to recover possession of land in this state, authorizes them to appear for their clients in a suit in equity, instituted by the defendants in that action, to establish their defence; and service of the subpoena in such suit on the attorneys may be allowed by the court and held to be good service. *Id.*

PUBLIC LANDS.

1. **KNOWN MINES—COAL.**—Whatever may have been originally the proper construction of the word "mines," as used in the pre-emption act of 1841 (5 Stat. 456), the act of July 1, 1864 (13 Stat. 343), gave a legislative construction to the term, which thenceforth attached to all known "coal-beds or coal-fields," in which no interest had before become vested, and withdrew such coal lands from the operation of all other acts of congress. *U. S. v. Mullan*, 466.
2. **SCHOOL AND COAL LANDS.**—After July 1, 1864, known coal lands were not subject to selection by the state in lieu of sections 16 and 36 for school purposes; and the secretary of the interior had no authority to list such lands to the state on such selections. *Id.*
3. **PATENT VACATED.**—Where the state selects a tract of land in lieu of a like quantity of unavailable school lands, which tract so selected is not subject to selection, and the same is listed over to the state by the secretary of the interior, and by the state thereupon patented to private parties, a court of equity upon a bill filed by the United States will annul the selection, listing over, and patent, whether the unlawful acts arose out of fraud, inadvertence, or mistake, or errors of law committed by the officers upon known facts, as to the authority of the state to select, or the secretary of the interior to list over. *Id.*
4. **BILL FILED BY ATTORNEY-GENERAL.**—Where a bill in chancery to annul a patent to land is filed in the name of the United States, having the signature of the attorney-general of the United States, subscribed by his authority, the court is authorized to entertain the bill. *Id.*
5. **VESTED RIGHTS.**—The state has no indefeasible vested right to select

lands in lieu of sections 16 and 36 from any particular class of lands at any time before selection actually made. Until selection, congress may withdraw any lands from the operation of laws permitting their selection. *Id.*

RATIFICATION.

See POWER OF ATTORNEY.

RECEIVER.

See EQUITY.

REMOVAL OF CAUSES.

1. CAUSE REMOVED—INJUNCTION.—Upon the removal of a cause from a state to a circuit court, the latter has power to modify or allow an injunction therein, before the first day of its next term. *Portland v. O. R. Co.*, 122.
2. THE ACT OF CONGRESS OF MARCH 3, 1875—MEANING OF TERMS "ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES." The act of congress of March 3, 1875, in its first section invests the circuit courts of the United States with original cognizance concurrent with the courts of the several states "of all suits of a civil nature at common law or in equity," where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, "arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority." Its second section declares that any suit of that character thus arising, brought in a state court, may be removed by either party into the circuit court of the United States: *Held*, following the decision of the supreme court of the United States in *Railroad Company v. Mississippi*, 102 U. S. 135: 1. That cases are to be considered as arising under the constitution or laws of the United States within the meaning of the act in question, when upon any of their provisions some right, or privilege, or claim, or protection, or defense, in whole or part is asserted in a judicial proceeding; and, 2. That it is therefore sufficient to maintain the jurisdiction of the circuit court of the United States, according to the decision mentioned, that the defence set up in the action necessarily involves a construction of a clause of the federal constitution. *San Mateo Co. v. S. P. R. R. Co.*, 517.

RES ADJUDICATA.

1. JURISDICTION—CONCLUSIVE ADJUDICATION.—Where the petition properly alleges that the intestate was an inhabitant of the county in which the petition is filed at or immediately before his death, together with all other necessary facts, and the court, upon such proper allegations and satisfactory proofs, adjudges the facts so alleged to be true, and issues letters of administration thereon, the adjudication of the fact of inhabitancy so made is conclusive, and the truth thereof cannot be controverted collaterally in any other proceeding. The judgment concludes further inquiry as to the jurisdictional fact by deciding it. *Holmes v. O. & C. R. R. Co.*, 380.
2. SAME.—The judgment in such case has the same conclusive effect as the judgment of a court of record of the United States upon the allegation

- in a complaint or bill in chancery of the jurisdictional fact of citizenship, or the judgment of a state court of record upon the jurisdictional fact of the place where the crime was committed alleged in the indictment. *Id.*
3. PROCEEDING IN REM.—The proceeding for the appointment of an administrator is in the nature of a proceeding *in rem*, to which all the world is a party, and all the world is estopped by the adjudication thereon. *Id.*
 4. THE CASE OF THOMPSON v. WHITMAN, 18 Wall. 457, and the cases therein cited, commented on and distinguished. *Id.*
 5. JURISDICTIONAL FACTS NOT CONCLUSIVELY DETERMINED.—Where the court is required to do some act through its ministerial officers or other lawfully appointed agencies, in order to acquire jurisdiction of the person or of the thing in a matter constituting a complete pre-existing cause of action—such as serving a summons on a party within the state, or seizing the thing within its territorial jurisdiction—the acts so to be performed by or on behalf of the court to give it jurisdiction are jurisdictional facts; and the determination of that class of jurisdictional facts by the court assuming jurisdiction is not conclusive, but the truth of such jurisdictional facts may be controverted in a collateral proceeding. *Id.*

REVENUE.

See CUSTOMS.

RUPEE.

See DUTIES.

SALVAGE.

1. SALVAGE—DERELICT COMPENSATION.—If a vessel, though with no one on board, under such circumstances that the persons assuming to be salvors knew or ought to have known that their services were not desired, and they take possession with intent to supplant the master and owners in giving her relief, they have no claim for compensation. *Bark Cleone*, 77.
2. SAME POSSESSION.—A stranded vessel, laden with a valuable cargo, was left, but not abandoned, by the master, having been placed in charge of an agent until he could return to recover his property: *Held*, that the wrecked vessel and her cargo could not be taken possession of by a stranger who was fully advised of these facts; and that the master was then on his way in another vessel to effect the salvage. *Id.*
3. SAME—COMPENSATION.—*Held*, further, that the mere fact of placing a man on board, with the object of anticipating and supplanting the master, would not entitle such stranger to a share of the property which was subsequently saved by the unaided efforts of the master. *Id.*

SCHOOL AND COAL LANDS.

1. KNOWN MINES—COAL.—Whatever may have been originally the proper construction of the word "mines," as used in the pre-emption act of 1841 (5 Stat. 456), the act of July 1, 1864 (13 Stat. 343), gave a legislative construction to the term, which thenceforth attached to all known "coal-beds or coal-fields," in which no interest had before become vested, and withdrew such coal lands from the operation of all other acts of congress. *United States v. Mullan*, 466.

2. SCHOOL AND COAL LANDS.—After July 1, 1864, known coal lands were not subject to selection by the state in lieu of sections 16 and 36 for school purposes; and the secretary of the interior had no authority to list such lands to the state on such selections. *Id.*

SEAMAN'S WAGES.

1. SEAMAN'S WAGES.—Where wages are admitted to have been earned, but deductions are claimed for payments on account and other offsets, the burden of proof is on the master to show the payments, etc., by a preponderance of proof. *Schooner Fritheoff*, 58.

SEQUESTRATION.

See EQUITY.

STAMPS.

See FRAUD AND FRAUDULENT CONVEYANCES.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS—FRAUD.—Under the statute of limitations of California, an action for relief on the ground of fraud must be brought within three years after the cause of action accrues. *Manning v. San Jacinto Tin Co.*, 418.
2. IGNORANCE OF THE FRAUD will not excuse laches in the complainant, when the fundamental facts upon which the frauds charged rest are matters of public record, and such as ought to afford a clue, which, if followed with reasonable diligence, must have led to a discovery of the frauds. *Id.*
3. LIMITATION OF ACTION TO RECOVER DUTIES—NOTICE TO IMPORTER OF DECISION OF SECRETARY.—Under section 2931 of the revised statutes the importer is not entitled to notice of the decision of the secretary upon an appeal from the collector, and the limitation of ninety days, within which the importer may commence an action under said section to recover duties alleged to have been illegally exacted, commences to run from the date of said decision, and not from the time the importer may have knowledge of it. *Chung Yune v. Shurtleff*, 448.

STATUTES CONSTRUED.

Acts March 12, 1860, 12 Stat. 3; of July 5, 1866, 14 Stat. 89; and June 18, 1874, 18 Stat. 80, Swamp Lands, construed, 48.

Revised Stat. Sec. 5511. Indictment under "Knowingly," 85.

Act May 10, 1872, and Revised Stat., Title XXXII, ch. 6. Mining Laws, 97.

United States Const., Art. 1, Sec. 8, and Sec. 2 Act February 14, 1859, 11 Stat. 383. Act admitting Oregon, 127.

Revised Stat., Sec. 4192. Registration, Mortgages of Vessels, 174.

Act June 30, 1864, Sec. 152, 13 Stat. 292, and July 13, 1866, 14 Stat. 141, and Sec. 156, 13 Stat. 293. Internal Revenue, 232.

Act June 30, 1864, Sec. 158, 13 Stat. 294, and 14 Stat. 152, 232.

Acts June 30, 1834, 4 Stat. 729; June 5, 1850, 9 Stat. 437; February 14, 1859, 11 Stat. 383. Indiana, 243.

Revised Stat. 3466 (1 Stat. 515, 676), 3490, 5438. Lien United States, 296.

- Revised Stat. 858. Compelling of Parties as Witnesses, 337.
 Revised Stat. 3564 and 2828, 2906, 3473, 3564. Foreign Coins, 348.
 Revised Stat. 2809. Revenue, Forfeiture, 364.
 Revised Stat. 716, 717, and Equity Rules 21 and 90. *Ne Exeat*, 404.
 Revised Stat. 2931. Notice to Importers of Goods, 448.
 Act 1841, 5 Stat. 456; July 1, 1864, 13 Stat. 343. Coal Mines, 466.
 Revised Stat. 4576, Act May 6, 1882. Chinese Immigration, 537, 542, 546.

SUBPENAS DUCES TECUM.

1. CONSULS NOT AMENABLE TO SUBPENA.—The provision of the constitution, which secures to the accused in criminal prosecutions the right to have compulsory process for obtaining witnesses in his favor, does not authorize the issuing of such process to ambassadors, who by public law, or consuls, who by express treaty, are not amenable to the process of the courts. *In re Dillon*, 561.
2. SUBPENA DUCES TECUM—OFFICIAL DOCUMENTS.—Where a subpoena *duces tecum*, directed to a consul of France, is prayed for, it is the duty of the court to require the party praying for it to show that the document is not an official paper, protected by law from examination and seizure. *Id.*

SUPERSEDEAS.

See ATTACHMENT, 2.

SURETIES.

1. SURETIES IN AN UNDERTAKING FOR AN ATTACHMENT, LIABILITY OF.—The sureties in an undertaking for an attachment under the Oregon civil code (section 144), in case the plaintiff fails to obtain judgment in the action, are liable to the defendant for all the costs and disbursements that may be adjudged to him, whether the latter are made in the action or upon the attachment. *Bing Gee v. Ah Jim*, 117.
2. APPEAL, WHEN DOES NOT PREVENT SUIT ON UNDERTAKING.—An appeal which does not operate as a *supersedeas*, will not prevent the appellee from maintaining an action upon the appellant's undertaking for an attachment in the court below. *Id.*

SWAMP LANDS.

See PUBLIC LANDS.

TAXES.

1. VOID SALE UNDER JUDGMENT FOR TAXES.—A sale of land to the highest bidder under an execution issued upon a personal judgment for taxes, recovered under the statute of California of May 17, 1861 (Stat. 1861, p. 471), requiring the sale of the "smallest quantity that any one will take and pay the judgment," and the tax deed issued upon such sale, are void. *Mora v. Nunez*, 455.

See INJUNCTION; MORTGAGE AND MORTGAGE TAX.

TENANTS IN COMMON.

1. CONDITIONAL LIMITATION—DEMAND OF POSSESSION IN CASE OF CO-TENANTS. G. conveyed an undivided interest in certain real property to H., in

trust, to secure the payment of a loan from W., with an agreement, that G. might remain in possession and take the rents and profits without account, until the note given for the loan was overdue and unpaid, in which case the trustee was to take possession and dispose of the property to satisfy the debt, and G. was to surrender the possession for this purpose on demand; the note became overdue and remained unpaid, and G. conveyed his interest in the premises to his co-tenant T., and gave him possession, when H. demanded such possession from T., who refused unqualifiedly, and continued to occupy the property and received the rents and profits thereof until the same was sold at a judicial sale, at the suit of H., for less than two thirds of the loan and interest: *Held*, 1. That the interest which G. had in the property, in case the debt was not duly paid, was not an estate upon condition which was not avoided until a demand for possession, but an estate upon a conditional limitation, which terminated with the happening of the contingency—the note becoming overdue and remaining unpaid, without any demand. 2. That the demand for possession required by the agreement was, under the circumstances, not a demand for the purpose of avoiding an estate, and therefore insufficient, unless made exactly for that which the trustee was entitled—nothing more nor less—but was the equivalent of a mere notice to quit by a landlord upon a tenant at will, and was sufficient, although in form it may have included a demand for the exclusive possession of the whole property, the refusal being in effect a denial of the trustee's right to the possession, even as a co-tenant. 3. The trustee being entitled as co-tenant with T. to the possession of the whole property, and the demand having been made by him for possession in pursuance of the agreement, it is to be construed and understood as a demand for possession as such co-tenant, and therefore it was not larger than the right of the party making it, and is sufficient, even if it was to have the effect of avoiding an estate. *Walker v. Teal*, 39.

2. CONSTRUCTION OF DIRECTION TO TRUSTEE TO SELL.—A conveyance in trust to secure the payment of a loan is made primarily for the benefit of the lender, and should be construed, so far as it is open to construction, so as to effect the object for which it was made, and therefore where such a conveyance provided that upon default in the payment of the loan, the trustee should take possession and sell the property upon thirty days' notice: *Held*, that the authority to sell was for the benefit of the lender, and the trustee was not bound to sell until he thought best for the payment of the loan, or was directed to do so by a court of equity, and in the mean time it was his duty to apply the rents and profits upon the debt. *Id.*

TORTS.

See FELLOW-SERVANT.

TRUSTS AND TRUSTEES.

1. CONDITIONAL LIMITATION—DEMAND OF POSSESSION IN CASE OF CO-TENANTS.
G. conveyed an undivided interest in certain real property to H., in trust, to secure the payment of a loan from W., with an agreement, that G. might remain in possession and take the rents and profits without account, until the note given for the loan was overdue and unpaid, in

which case the trustee was to take possession and dispose of the property to satisfy the debt, and G. was to surrender the possession for this purpose on demand; the note became overdue and remained unpaid, and G. conveyed his interest in the premises to his co-tenant T., and gave him possession, when H. demanded such possession from T., who refused unqualifiedly, and continued to occupy the property and received the rents and profits thereof until the same was sold at a judicial sale, at the suit of H., for less than two thirds of the loan and interest: *Held*, 1. That the interest which G. had in the property, in case the debt was not duly paid, was not an estate upon condition which was not avoided until a demand for possession, but an estate upon a conditional limitation, which terminated with the happening of the contingency—the note becoming overdue and remaining unpaid, without any demand. 2. That the demand for possession required by the agreement was, under the circumstances, not a demand for the purpose of avoiding an estate, and therefore insufficient, unless made exactly for that which the trustee was entitled—nothing more nor less—but was the equivalent of a mere notice to quit by a landlord upon a tenant at will, and was sufficient, although in form it may have included a demand for the exclusive possession of the whole property, the refusal being in effect a denial of the trustee's right to the possession, even as a co-tenant. 3. The trustee being entitled as co-tenant with T. to the possession of the whole property, and the demand having been made by him for possession in pursuance of the agreement, it is to be construed and understood as a demand for possession as such co-tenant, and therefore it was not larger than the right of the party making it, and is sufficient, even if it was to have the effect of avoiding an estate. *Walker v. Teal*, 39.

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UNITED STATES.

1. PRIORITY OF THE UNITED STATES.—Section 3466 (1 Stat. 515, 676) of the revised statutes, does not give the United States a lien upon its debtor's property, but only a right to priority of payment out of the same in certain cases, one of which is, where a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof. *U. S. v. Griswold*, 296.
2. SAME—ASSIGNMENT.—A debtor of the United States may assign his property within the meaning of this statute by means of judgments confessed in favor of various persons for amounts equal in the aggregate to the value thereof, and the priority of the United States will thereupon

attach to the property and prevail against said judgments, but subject to all prior valid liens thereon. *Id.*

3. PRIORITY OF THE UNITED STATES—HOW ASSERTED.—A sale of property of a debtor of the United States made upon a decree or judgment given after the right of priority of the latter attached disregarded, and the matter referred to the master to take an account of the sums due on the valid liens thereon and sell the property free from them and distribute the proceeds accordingly. *Id.*

VESSELS.

See ADMIRALTY.

WAGON-ROAD GRANT.

1. PATENT—CONTRADICTION OF, BY ORAL EVIDENCE.—On March 12, 1860 (12 Stat. 3), congress granted the swamp and overflowed lands in Oregon to the state to be identified and patented by the secretary of the interior; on July 5, 1866 (14 Stat. 89), congress granted to the state, to aid in the construction of a wagon-road from Albany to the eastern line thereof, three sections per mile of the public lands to be selected within six miles of said road as the same might be located, and on June 18, 1874 (18 Stat. 80), authorized patents to issue thereof as fast as the same should be selected and certified; and on June 19, 1876, a patent was issued under said wagon-road grant to the state, or its assigns, for the premises in controversy: *Held*, that the patent was conclusive evidence at law that the premises were included in the wagon-road grant, and were therefore not swamp land—the latter conclusion being a necessary element of the former. *Cahn v. Barnes*, 48.

WALLAMET RIVER.

See BRIDGES.

WATER POWER.

1. APPURTENANCE.—A water right, granted in gross, does not become technically appurtenant to land and a mill upon and for which it is subsequently used by the grantee thereof; but where such water power is taken and applied to run a mill belonging to the owner of the power, and afterwards, while the water power is so being used, the owner conveys the premises by metes and bounds without mentioning the water right, the right may pass therewith as parcel thereof, if such appears to have been the intention of the parties. *B'k B. N. A. v. Miller*, 163.
- WATER POWER NOT APPURTENANT, WHEN PASSES WITH LAND.—In 1864 a water right was granted by the owner of the basin at Oregon city in gross, and in 1866 the same was taken and applied to the use of a paper mill and machine shop on block 2 in said town; and in 1867, the same being the property of the owners of the water power, they converted it into a flour mill and applied such water power to the use thereof continuously and exclusively until 1878, when the owner of the mill and power conveyed the mill, describing the property by metes and bounds only, and without any express mention of said water right, to

secure a loan of twenty thousand dollars, payable in two years, with interest at the rate of one per centum per month; the said property, including said water right, being then worth not to exceed twenty-five thousand dollars, of which sum the water right was worth one-third: *Held*, that upon the facts and circumstances of the case, it satisfactorily appeared that it was the intention of the parties that the water right should pass with the land and mill, and being then used in connection therewith, it did so pass as parcel thereof. *Id.*

WITNESSES.

1. PARTY AS WITNESS WHEN OPPOSITE PARTY DEAD.—In the courts of the United States there can be no exclusion of a witness on the ground of interest in the event of the suit, except in the cases directly mentioned in section 858, Revised Statutes of the United States, i. e., where an executor, administrator, or guardian is a party such as that judgment may be rendered for or against him. *Rice v. Martin*, 337.

attach to the property and prevail against said judgments, but subject to all prior valid liens thereon. *Id.*

3. PRIORITY OF THE UNITED STATES—HOW ASSERTED.—A sale of property of a debtor of the United States made upon a decree or judgment given after the right of priority of the latter attached disregarded, and the matter referred to the master to take an account of the sums due on the valid liens thereon and sell the property free from them and distribute the proceeds accordingly. *Id.*

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1. PATENT—CONTRADICTION OF, BY ORAL EVIDENCE.—On March 12, 1860 (12 Stat. 3), congress granted the swamp and overflowed lands in Oregon to the state to be identified and patented by the secretary of the interior; on July 5, 1866 (14 Stat. 89), congress granted to the state, to aid in the construction of a wagon-road from Albany to the eastern line thereof, three sections per mile of the public lands to be selected within six miles of said road as the same might be located, and on June 18, 1874 (18 Stat. 80), authorized patents to issue thereof as fast as the same should be selected and certified; and on June 19, 1876, a patent was issued under said wagon-road grant to the state, or its assigns, for the premises in controversy: *Held*, that the patent was conclusive evidence at law that the premises were included in the wagon-road grant, and were therefore not swamp land—the latter conclusion being a necessary element of the former. *Cahn v. Barnes*, 48.

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1. APPURTENANCE.—A water right, granted in gross, does not become technically appurtenant to land and a mill upon and for which it is subsequently used by the grantee thereof; but where such water power is taken and applied to run a mill belonging to the owner of the power, and afterwards, while the water power is so being used, the owner conveys the premises by metes and bounds without mentioning the water right, the right may pass therewith as parcel thereof, if such appears to have been the intention of the parties. *B'k B. N. A. v. Miller*, 163.
2. WATER POWER NOT APPURTENANT, WHEN PASSES WITH LAND.—In 1864 a water right was granted by the owner of the basin at Oregon city in gross, and in 1866 the same was taken and applied to the use of a paper mill and machine shop on block 2 in said town; and in 1867, the same being the property of the owners of the water power, they converted it into a flour mill and applied such water power to the use thereof continuously and exclusively until 1878, when the owner of the mill and power conveyed the mill, describing the property by metes and bounds only, and without any express mention of said water right, to

secure a loan of twenty thousand dollars, payable in two years, with interest at the rate of one per centum per month; the said property, including said water right, being then worth not to exceed twenty-five thousand dollars, of which sum the water right was worth one-third: *Held*, that upon the facts and circumstances of the case, it satisfactorily appeared that it was the intention of the parties that the water right should pass with the land and mill, and being then used in connection therewith, it did so pass as parcel thereof. *Id.*

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2. SCHOOL AND COAL LANDS.—After July 1, 1864, known coal lands were not subject to selection by the state in lieu of sections 16 and 36 for school purposes; and the secretary of the interior had no authority to list such lands to the state on such selections. *Id.*

SEAMAN'S WAGES.

1. SEAMAN'S WAGES.—Where wages are admitted to have been earned, but deductions are claimed for payments on account and other offsets, the burden of proof is on the master to show the payments, etc., by a preponderance of proof. *Schooner Fritheoff*, 58.

SEQUESTRATION.

See EQUITY.

STAMPS.

See FRAUD AND FRAUDULENT CONVEYANCES.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS—FRAUD.—Under the statute of limitations of California, an action for relief on the ground of fraud must be brought within three years after the cause of action accrues. *Manning v. San Jacinto Tin Co.*, 418.
2. IGNORANCE OF THE FRAUD will not excuse *laches* in the complainant, when the fundamental facts upon which the frauds charged rest are matters of public record, and such as ought to afford a clue, which, if followed with reasonable diligence, must have led to a discovery of the frauds. *Id.*
3. LIMITATION OF ACTION TO RECOVER DUTIES—NOTICE TO IMPORTER OF DECISION OF SECRETARY.—Under section 2931 of the revised statutes the importer is not entitled to notice of the decision of the secretary upon an appeal from the collector, and the limitation of ninety days, within which the importer may commence an action under said section to recover duties alleged to have been illegally exacted, commences to run from the date of said decision, and not from the time the importer may have knowledge of it. *Chung Yune v. Shurtleff*, 448.

STATUTES CONSTRUED.

Acts March 12, 1860, 12 Stat. 3; of July 5, 1866, 14 Stat. 89; and June 18, 1874, 18 Stat. 80, Swamp Lands, construed, 48.

Revised Stat. Sec. 5511. Indictment under "Knowingly," 85.

Act May 10, 1872, and Revised Stat., Title XXXII, ch. 6. Mining Laws, 97.

United States Const., Art. 1, Sec. 8, and Sec. 2 Act February 14, 1859, 11 Stat. 383. Act admitting Oregon, 127.

Revised Stat., Sec. 4192. Registration, Mortgages of Vessels, 174.

Act June 30, 1864, Sec. 152, 13 Stat. 292, and July 13, 1866, 14 Stat. 141, and Sec. 156, 13 Stat. 293. Internal Revenue, 232.

Act June 30, 1864, Sec. 158, 13 Stat. 294, and 14 Stat. 152, 232.

Acts June 30, 1834, 4 Stat. 729; June 5, 1850, 9 Stat. 437; February 14, 1859, 11 Stat. 383. Indians, 243.

Revised Stat. 3466 (1 Stat. 515, 676), 3490, 5438. Lien United States, 296.

Revised Stat. 858. Compelling of Parties as Witnesses, 337.
 Revised Stat. 3564 and 2828, 2906, 3473, 3564. Foreign Coins, 348.
 Revised Stat. 2809. Revenue, Forfeiture, 364.
 Revised Stat. 716, 717, and Equity Rules 21 and 90. *Ne Exeat*, 404.
 Revised Stat. 2931. Notice to Importers of Goods, 448.
 Act 1841, 5 Stat. 456; July 1, 1864, 13 Stat. 343. Coal Mines, 466.
 Revised Stat. 4576, Act May 6, 1882. Chinese Immigration, 537, 542, 546.

SUBPŒNAS DUCES TECUM.

1. CONSULS NOT AMENABLE TO SUBPŒNA.—The provision of the constitution, which secures to the accused in criminal prosecutions the right to have compulsory process for obtaining witnesses in his favor, does not authorize the issuing of such process to ambassadors, who by public law, or consuls, who by express treaty, are not amenable to the process of the courts. *In re Dillon*, 561.
2. SUBPŒNA DUCES TECUM—OFFICIAL DOCUMENTS.—Where a subpœna *duces tecum*, directed to a consul of France, is prayed for, it is the duty of the court to require the party praying for it to show that the document is not an official paper, protected by law from examination and seizure. *Id.*

SUPERSEDEAS.

See ATTACHMENT, 2.

SURETIES.

1. SURETIES IN AN UNDERTAKING FOR AN ATTACHMENT, LIABILITY OF.—The sureties in an undertaking for an attachment under the Oregon civil code (section 144), in case the plaintiff fails to obtain judgment in the action, are liable to the defendant for all the costs and disbursements that may be adjudged to him, whether the latter are made in the action or upon the attachment. *Bing Gee v. Ah Jim*, 117.
2. APPEAL, WHEN DOES NOT PREVENT SUIT ON UNDERTAKING.—An appeal which does not operate as a *supersedeas*, will not prevent the appellee from maintaining an action upon the appellant's undertaking for an attachment in the court below. *Id.*

SWAMP LANDS.

See PUBLIC LANDS.

TAXES.

1. VOID SALE UNDER JUDGMENT FOR TAXES.—A sale of land to the highest bidder under an execution issued upon a personal judgment for taxes, recovered under the statute of California of May 17, 1861 (Stat. 1861, p. 471), requiring the sale of the "smallest quantity that any one will take and pay the judgment," and the tax deed issued upon such sale, are void. *Mora v. Nunez*, 455.

See INJUNCTION; MORTGAGE AND MORTGAGE TAX.

TENANTS IN COMMON.

1. CONDITIONAL LIMITATION—DEMAND OF POSSESSION IN CASE OF CO-TENANTS. G. conveyed an undivided interest in certain real property to H., in

trust, to secure the payment of a loan from W., with an agreement, that G. might remain in possession and take the rents and profits without account, until the note given for the loan was overdue and unpaid, in which case the trustee was to take possession and dispose of the property to satisfy the debt, and G. was to surrender the possession for this purpose on demand; the note became overdue and remained unpaid, and G. conveyed his interest in the premises to his co-tenant T., and gave him possession, when H. demanded such possession from T., who refused unqualifiedly, and continued to occupy the property and received the rents and profits thereof until the same was sold at a judicial sale, at the suit of H., for less than two thirds of the loan and interest: *Held*, 1. That the interest which G. had in the property, in case the debt was not duly paid, was not an estate upon condition which was not avoided until a demand for possession, but an estate upon a conditional limitation, which terminated with the happening of the contingency—the note becoming overdue and remaining unpaid, without any demand. 2. That the demand for possession required by the agreement was, under the circumstances, not a demand for the purpose of avoiding an estate, and therefore insufficient, unless made exactly for that which the trustee was entitled—nothing more nor less—but was the equivalent of a mere notice to quit by a landlord upon a tenant at will, and was sufficient, although in form it may have included a demand for the exclusive possession of the whole property, the refusal being in effect a denial of the trustee's right to the possession, even as a co-tenant. 3. The trustee being entitled as co-tenant with T. to the possession of the whole property, and the demand having been made by him for possession in pursuance of the agreement, it is to be construed and understood as a demand for possession as such co-tenant, and therefore it was not larger than the right of the party making it, and is sufficient, even if it was to have the effect of avoiding an estate. *Walker v. Teal*, 39.

2. CONSTRUCTION OF DIRECTION TO TRUSTEE TO SELL.—A conveyance in trust to secure the payment of a loan is made primarily for the benefit of the lender, and should be construed, so far as it is open to construction, so as to effect the object for which it was made, and therefore where such a conveyance provided that upon default in the payment of the loan, the trustee should take possession and sell the property upon thirty days' notice: *Held*, that the authority to sell was for the benefit of the lender, and the trustee was not bound to sell until he thought best for the payment of the loan, or was directed to do so by a court of equity, and in the mean time it was his duty to apply the rents and profits upon the debt. *Id.*

TORTS.

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UNITED STATES.

1. PRIORITY OF THE UNITED STATES.—Section 3466 (1 Stat. 515, 676) of the revised statutes, does not give the United States a lien upon its debtor's property, but only a right to priority of payment out of the same in certain cases, one of which is, where a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof. *U. S. v. Griswold*, 296.
2. SAME—ASSIGNMENT.—A debtor of the United States may assign his property within the meaning of this statute by means of judgments confessed in favor of various persons for amounts equal in the aggregate to the value thereof, and the priority of the United States will thereupon

attach to the property and prevail against said judgments, but subject to all prior valid liens thereon. *Id.*

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